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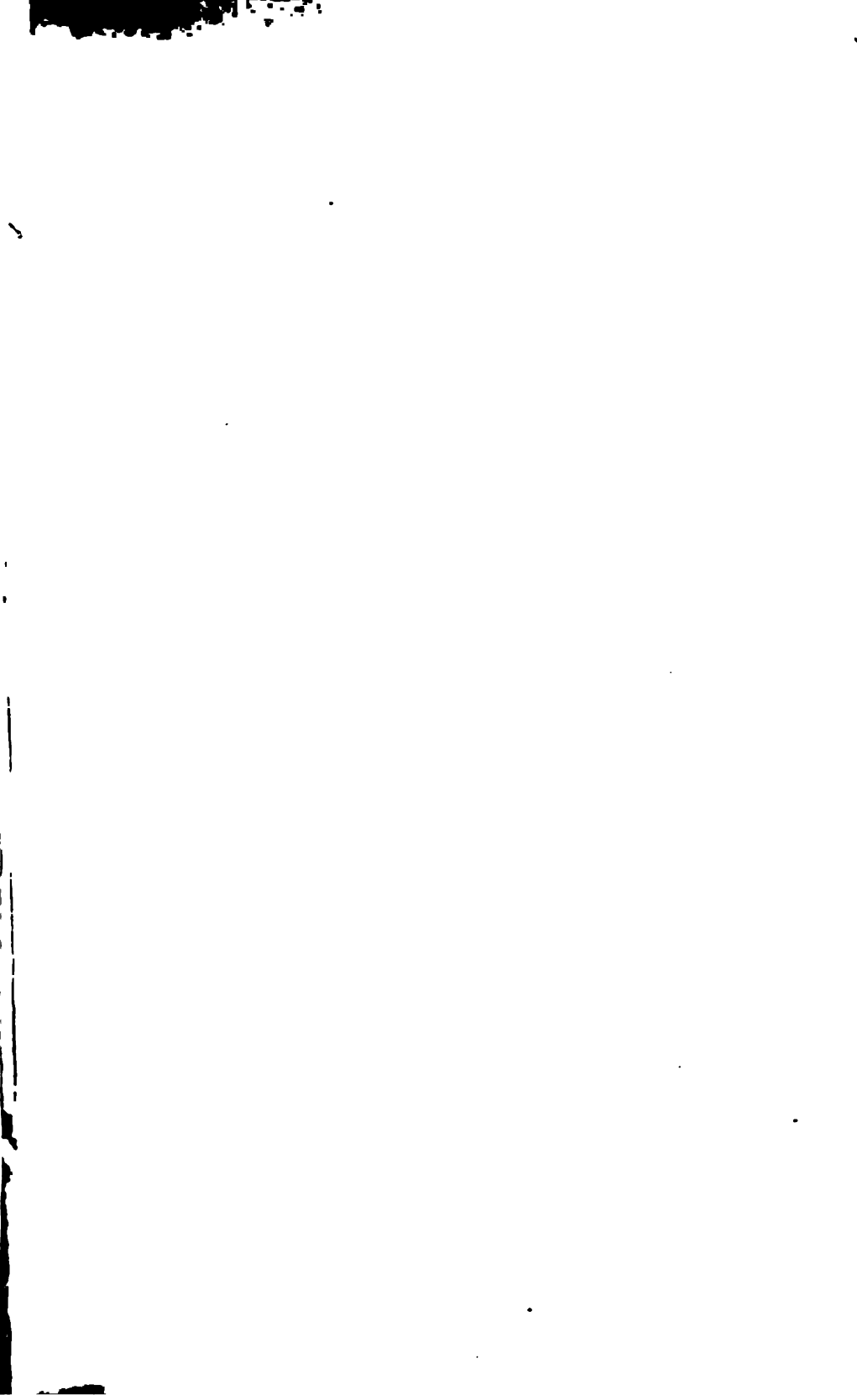
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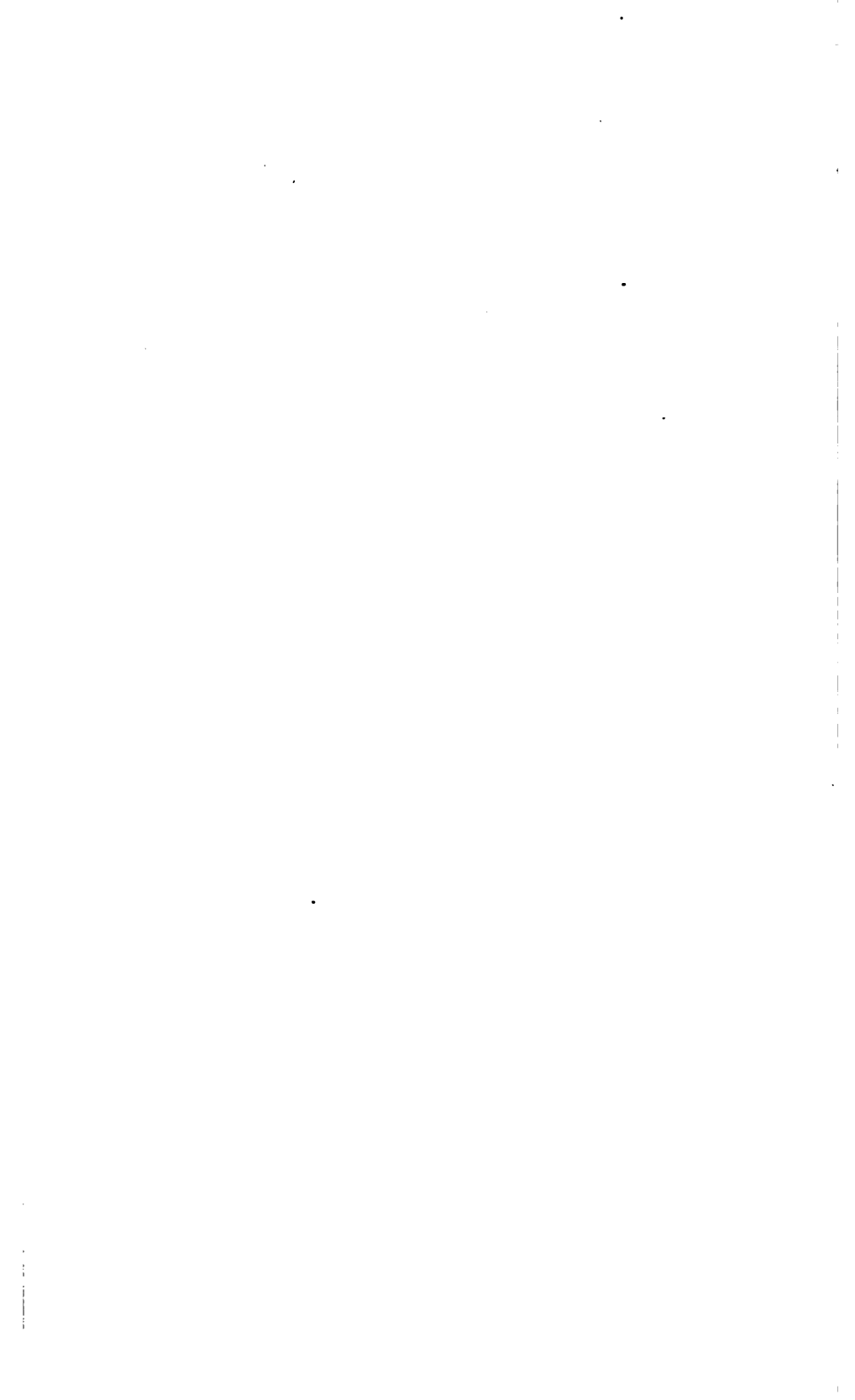
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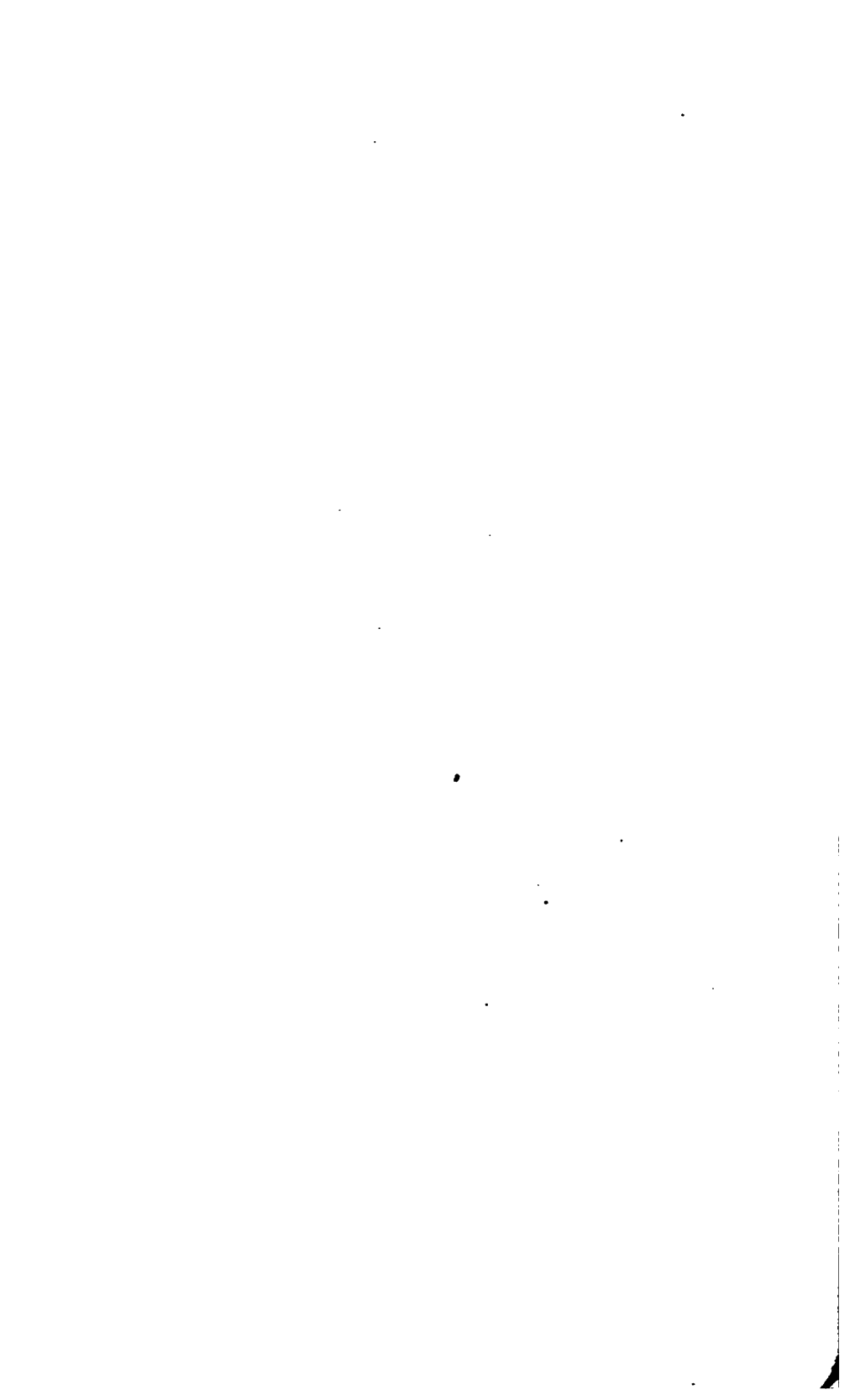
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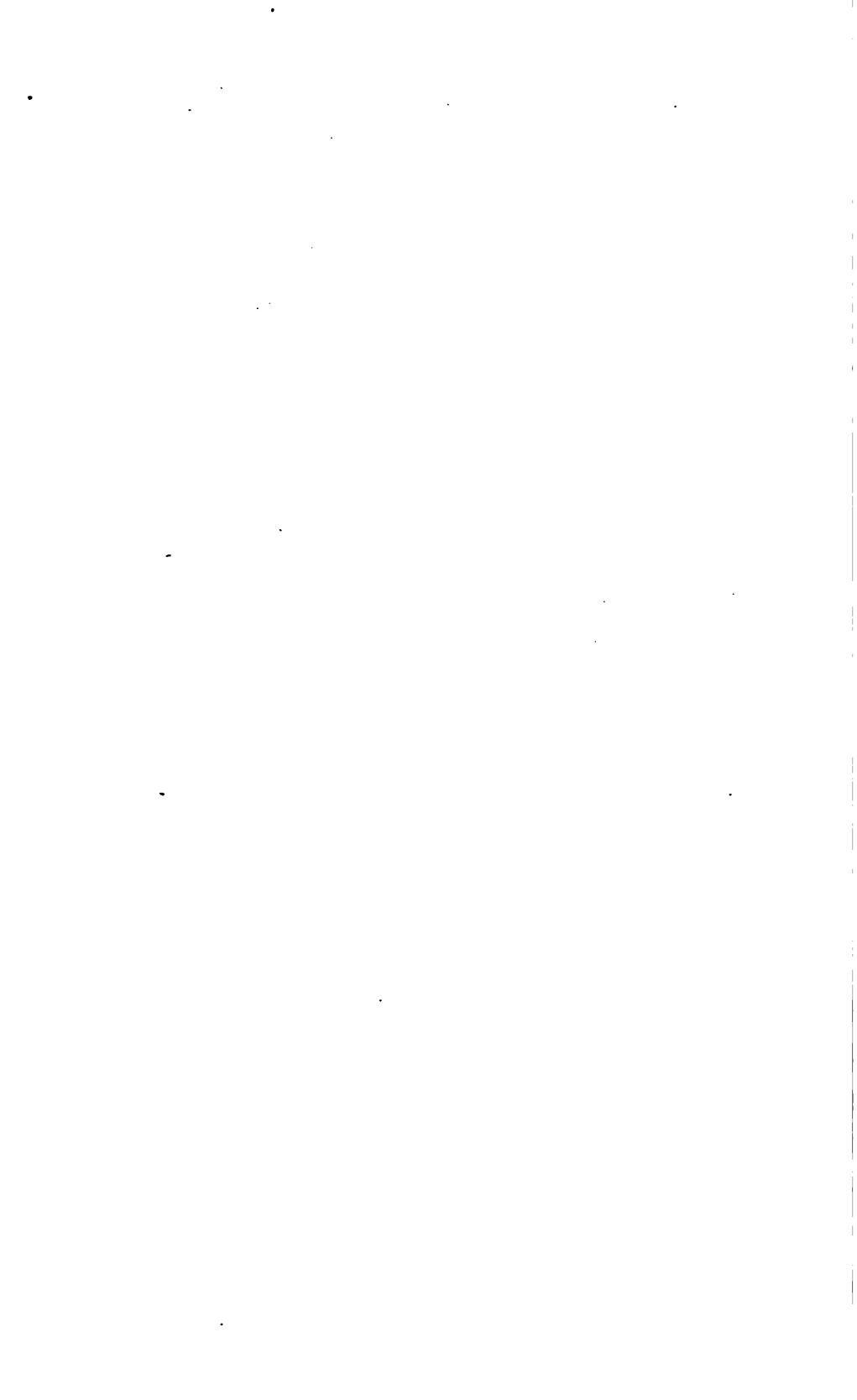
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Common Law.

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

VOL. LVI.

CONTAINING

The Cases in the Court of Common Pleas, in Easter and Trinity Terms and Trinity Vacation,
1847.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS.
1852.

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COMMON BENCH REPORTS.

CASES ARGUED AND DETERMINED
IN
THE COURT OF COMMON PLEAS,
IN
EASTER AND TRINITY TERMS AND TRINITY VACATION, 1847.

WITH TABLES OF THE NAMES OF CASES ARGUED AND OF
THE PRINCIPAL MATTERS.

BY	
JAMES MANNING,	T. C. GRANGER,
SERJEANT AT LAW;	OF THE INNER TEMPLE, ESQ.
	BARRISTER AT LAW;
AND JOHN SCOTT,	
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.	

VOL. IV.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS,
NO. 197 CHESTNUT STREET.
1852.



JUDGES
OF
THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir THOMAS WILDE, Knt., Ld. C. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

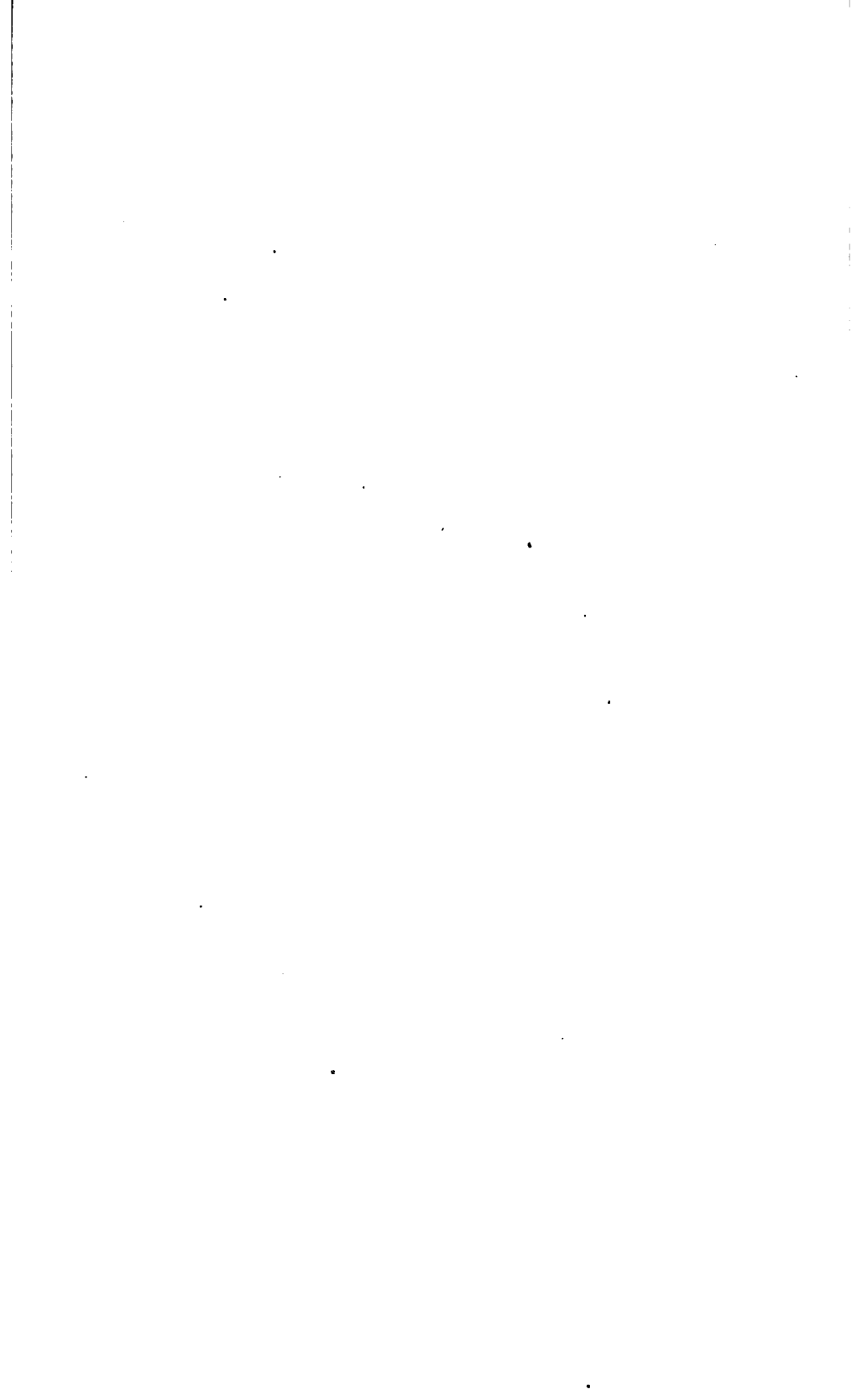
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.

ATTORNEY-GENERAL.

Sir JOHN JERVIS, Knt.

SOLICITOR-GENERAL.

Sir DAVID DUNDAS, Knt.



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CASES

UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas, Hilary, and Easter Terms,

IN THE

TENTH YEAR OF THE REIGN OF VICTORIA.

Eastern Division of SOMERSETSHIRE.

JAMES GEORGE HAYDEN, on behalf of THOMAS SEREL,(a)
Appellant, The Overseers of TWERTON, Respondents. Nov. 12.

The assigner of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July.

THOMAS SEREL objected to the name of Richard Ainsworth being retained in the list of voters for the parish of Twerton. Richard Ainsworth had claimed, *and had been placed upon the list of claimants in the following form :—

[*2

Christian Name and Surname of each Voter.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like Place in this Parish, and Number of House, where the Property is situated.
Ainsworth. Richard.	Redcliff Parade, Bristol.	Undivided Share of a Freehold Rent-charge.	Charles Wilkins, Cloth Mills, Twerton.

It appeared, that, eight years ago, the above-named Charles Wilkins, in consideration of 2400*l.*, had effectually granted to William Naish, his

(a) See *Wanklyn*, app., *Woollett*, resp., post, p. 86.

2 HAYDEN, App. Overseers of TWERTON, Resp. M. T. 1846.

heirs and assigns, a rent-charge of 100*l.* a year, payable quarterly, for ever, issuing out of the cloth-mills at Twerton, then the property of the grantor, and then and now in his possession, and of sufficient value. Such rent-charge was regularly paid to William Naish from the time it was granted to him till the 29th of September, 1845.

On the 19th of January last, William Naish, in consideration of 2420*l.*, duly conveyed the whole of his interest in this rent-charge to William Tothill, Joseph Fry, and Samuel Price Jackson, and their heirs and assigns, and, upon the same day, an indenture was executed between the last-mentioned three persons, and forty-seven other persons, of whom Richard Ainsworth was one, whereby it appeared that Tothill, Fry, and Jackson held the rent-charge in trust for themselves, Richard Ainsworth, and the forty-six other persons parties to the last-mentioned indenture, and their respective heirs and assigns, as tenants in common.

The consideration for the rent-charge, and the costs of the conveyance, were paid in equal proportions by each of these fifty purchasers, parties to the last-mentioned indenture.

*8] *On the 9th of April last, one of the trustees applied to Mr. Wilkins for the rent due on the 25th of March, and was then informed that the premises out of which the rent-charge was payable, had become the property of the National Provincial Bank of England; and that Mr. Wilkins was then only tenant thereof, and awaited the authority of the bank to pay the rent-charge to the trustees, instead of paying it to Mr. Naish.

On the 29th of April, Mr. Wilkins paid to the trustees the sum of 48*l.* 10*s.* 10*d.*, being the half-year's rent due in the March preceding, less the income-tax thereon. The trustees immediately divided the said sum of 48*l.* 10*s.* 10*d.* equally among themselves, Richard Ainsworth, and the forty-six other persons entitled thereto.

Mr. Wilkins still continues to occupy these mills as tenant; and he occupied other cloth-mills adjoining; the whole of which mills are commonly called Twerton Cloth-Mills: but, by persons in the factory, and by some persons in the village, the mills are distinguished as the Upper and the Lower Mills; and it is upon that part of the property so distinguished as the Lower Mills that the rent in question is charged.

It was objected, first, that the deduction of the income-tax, which the tenant had a right to make, and had made, from the rent, reduced the freehold of each person below the requisite value. The revising barrister decided that each person, notwithstanding such deduction, had a freehold of 40*s.* a year.

It was next objected that the name of the actual owner of the property should have appeared, and not the name of Charles Wilkins, who had sold the property five years before. The barrister decided, that, inasmuch as the fourth column in the list was for the sole purpose of iden-

tifying the property, the name of Charles Wilkins, who was, in the neighbourhood, the reputed *owner, was sufficient; but that, if not, he (the barrister) had power, under the statute, to correct the mistake, if it was one, and insert the names of Henry Sharp and others, the persons to whom the property had been conveyed in trust for the National Provincial Bank of England. [*4]

The next objection was, that the situation of the property was not correctly stated: that instead of "Cloth Mills," it should have been "Lower Cloth Mills." The barrister decided that the description of the property was sufficient; but that, if not, he had power, under the act, to describe it more clearly and accurately, by inserting the word "Lower." It was lastly objected that Richard Ainsworth was not in the actual possession of his freehold, or in the receipt of the rents and profits thereof for his own use, for six calendar months next previous to the last day of July in the present year. The barrister decided that he was, and consequently retained his name upon the list.

The cases of forty-nine other persons, who were proved to have precisely the same qualification with Richard Ainsworth, and who were objected to by Thomas Serel on precisely the same grounds, and as to whom the barrister came to the same decision, were consolidated with the principal case.

Cockburn, for the appellant. The court will not be called upon to consider the first three objections taken before the revising barrister. The last objection is clearly sufficient to displace Ainsworth and the others from the register. That is decided by the case of *Murray*, app., *Thorniley*, resp., 2 Man. Gr. & S. 217, 1 Lutw. Reg. Cas. 446, where it was held that the words "actual possession," in the 2 W. 4, c. 45, s. 26, *mean a possession *in fact*, as contradistinguished from a possession *in law*; and, therefore, that a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July. There, the rent-charge was created by a deed bearing date the 28th of January, 1845, by which the same was made payable on the 1st of January in every year, the first payment to become due and be made on the 1st of January, 1846. In delivering the judgment of the court, TINDAL, C. J., there said: "It was contended on the part of the appellant, that he had the complete right to the rent-charge from the time of the execution of the deed by which it was granted, and that he had the actual possession also within the meaning of the statute, because he had all the possession of which the subject-matter is capable, before the first day of payment had actually arrived. The question undoubtedly turns upon the meaning of the words 'actual possession;' and we (a) think those words mean a possession *in fact*, as contradistinguished from a possession *in law*; and that, as the possession in fact of a rent-charge must be the

(a) Tindal, C. J., and Cresswell and Erie, Js.

actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed." The principle being fully settled by that case, it will be enough to show that the dates here bring this case precisely within it. This rent-charge was granted by Wilkins to Naish eight years ago, and was regularly paid to him till the 29th of September, 1845. On the 19th of January, 1846, Naish conveyed his interest in the rent-charge to Tothill, Fry, and Jackson. The first *6] quarterly payment since this conveyance, became due on the 25th of March, 1846; but it was not received by the parties entitled to it until the 29th of April, before which day they had no actual possession.

Kinglake, Serjt., for the respondent. The present case is materially distinguishable from that referred to. This is not a rent-charge originally created by the deed of the 19th of January, 1846. That deed merely transferred to the claimants an *existing* rent-charge. In *Murray*, app., *Thorniley*, resp., there was no person who had actual possession of the rent-charge in the sense in which the court understood that expression. Here, however, there was. There, the first payment of the rent-charge was not due at the time the grantee claimed to vote: he was, therefore, neither in actual possession, nor in the receipt of the rent. It is sufficient if rent *became due* before the 31st of July, though not paid. At all events, under the assignment from Naish, these parties had an equitable interest sufficient to entitle them to vote, Naish being trustee for them. One of the grounds of the judgment in *Murray*, app., *Thorniley*, resp., was, that there was no such seisin in anybody as would be necessary in order to maintain an assize. That is a reason that would not apply here. [MAULE, J. The authority chiefly relied on by the court in that case was Coke upon Littleton, 160 a, which seems to show that there must be actual manual seisin or perception of the money, like the taking of esplees. It seems, however, from Gilbert on Rents, 106 *et seq.*, that, if the grantee receives a penny by way of payment, though no part of the rent is actually due, that was sufficient to support an assize. I am not prepared to say that I should *7] have come to the same conclusion that the court *did in *Murray*, app., *Thorniley*, resp.] The test of the qualification is, the value of the freehold: therefore it was, that, early in the history of election law, the right to vote was extended to parties beneficially interested.

Cockburn, in reply. Naish could not be trustee for these claimants, as he did not continue seised. They clearly had no equitable right on which to found a qualification. The case cannot be distinguished from that cited.

WILDE, C. J. It is extremely important that the decisions of the court upon this statute should be put upon grounds that are distinct and intelligible, and should not be rendered doubtful by nice and subtle distinctions. The question presented to us by this case, came under the consideration of this court in *Murray*, app., *Thorniley*, resp. Assuming that the court there came to a proper determination upon the construction of the 2 W. 4, c. 45, s. 26, all that remains for us is, to see whether this case presents a distinction sufficient to prevent its being governed by that decision. I am of opinion that it does not. It was there held that the words "actual possession" mean a possession *in fact*, as contradistinguished from a possession *in law*; and therefore, that a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July. Here, there was no actual receipt of the rent-charge by the claimants for the period prescribed. But it is contended that the words of the statute are satisfied by the fact of the rent-charge having been for several years received by the grantee; and it is insisted that he may be considered as a trustee for the assignees. I do not accede to that. By the conveyance of the 19th of January, 1846, Naish divested himself of all interest in *the rent-charge; he had nothing [*8 further to do with it.(a) Then, the first payment not being due to the assignees until the 25th of March, and only being paid to them on the 29th of April, it is impossible to say that there was any "actual possession" by them, in the sense put by the case referred to—and which I think we are bound to hold to have been rightly decided—upon the twenty-sixth section of the reform act. I therefore think the decision of the revising barrister must be reversed, and the names expunged from the register.

COLTMAN, J. The court, in *Murray*, app., *Thorniley*, resp., seem to me to have laid down a rule that is clear and intelligible, and one calculated to exclude collusion: and I see no ground upon which this case can be distinguished from it.

MAULE, J. The case of *Murray*, app., *Thorniley*, resp., proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rent-charge, is such as would have been necessary to enable the grantee to maintain an assize. Taking that to be the principle of the decision, and assuming it to be right, the only question here is, whether these parties had such a seisin for six months before the last day of July. The authorities relied on in that case show that actual seisin is quite independent of the rent being *due*. The payment may be forward or backward. The claimants here became first actually possessed of this rent-charge on the 29th of April, and therefore

(a) If the fifty purchasers had simply *contracted* with Naish, instead of taking a conveyance from him, it would seem that his continuing *actual* seisin of the legal freehold, would have vested in them a complete *actual* equitable seisin from the moment of the signing of the contract.

have not been in actual possession for the time required by the act.
 *9] Naish cannot be said to have been trustee for *them. He had
 “duly conveyed the whole of his interest.” The moment he conveyed, he became a stranger to the rent-charge. Following, therefore, the decision cited, I think we are bound to give effect to this appeal.

WILLIAMS, J., concurred.

Decision reversed.

Borough of LANCASTER.

JOHN EIDSFORTH, Appellant, RICHARD FARRER, Respondent. Nov. 12.

In a notice of objection under the 6 & 7 Vict. c. 18, s. 17, the objector was described as—
 “R. F., of &c., on the list of voters for the borough of L.” The register of voters for the borough of L. consists of four separate lists, viz. one, of 10l. householders for each of three townships comprised in it; and one, of the freemen of the borough. The objector's name was on the last-mentioned list only:—*Held*, that he was insufficiently described in the notice; and that the inaccuracy of description was not cured by the 101st section.

RICHARD FARRER objected to the name of John Eidsforth being retained in the list of persons entitled to vote for the borough of Lancaster. The name of John Eidsforth was in the list published by the town-clerk of the said borough. The notice of objection, which had been duly served upon John Eidsforth, was as follows:—

“To Mr. John Eidsforth.

“I hereby give you notice, that I object to your name being retained on the list of persons entitled to vote in the election of members for the borough of Lancaster. Dated, this 21st day of August, 1846.

(Signed) “RICHARD FARRER,
 Canal Side, near Penny Street, Cotton Manufacturer, Lancaster; on the list of voters for the borough of Lancaster.”

*10] *The notice to the town-clerk was similarly subscribed.

It was objected, on behalf of Eidsforth, that the said notice of objection was insufficient, and that he was not called upon to prove that he was entitled to have his name retained in the said list of voters.

The register of voters for the borough of Lancaster is composed of four separate lists of names; viz. one list of 10l. householders for each of the three townships forming parts of the borough, made out and published by the respective overseers, and one list of freemen of the borough at large, without reference to townships, made out and published by the town-clerks.

These four lists were duly submitted to the revising barrister, for revision, at the opening of the court for the borough of Lancaster; and, upon one of them, viz. upon the list of freemen for the borough at large, and also upon the existing register, he found the name of Richard Farrer, the objector, with his place of abode as stated in the said notice of objection.

It was contended, in support of the objection to the notice, that it did not comply with the directions given in schedule (B.), No. 11, of the registration act, (6 & 7 Vict. c. 18,) and did not state with sufficient particularity, upon which of the four lists the name of the said Richard Farrer appeared.

The revising barrister was of opinion that, as no form was given in the said schedule, to meet the case of objections by freemen, excepting in the city of London, and as the name of the said Richard Farrer did in fact appear upon the only list which was applicable to the borough at large, viz. the town-clerk's list of freemen, the requirements of the seventeenth section of the statute had been sufficiently complied with. He therefore overruled the preliminary objection, and required it to be proved that Eidsforth was entitled to have *his name inserted in the said list of voters; and, no proof to that effect being offered, he expunged the name of Eidsforth from the said list. [*11]

The question for the opinion of the court, is, whether the above notice of objection was sufficient in law to call upon Eidsforth to prove his title to have his name retained in the list. If the court are of opinion that the notice was insufficient, the name of Eidsforth is to be replaced upon the register of voters.

The cases of ten persons on the list of freemen, and of three on the 10l. householder's list, whose names were expunged on the objection of Farrer, upon like notices, were consolidated with the principal case.

Byles, Serjt., for the appellant. By the 6 & 7 Vict. c. 18, s. 17, "every person whose name has been inserted in any list of voters for any city or borough, may object to any other person as not having been entitled, on the last day of July next preceding, to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th of August in that year, give or cause to be given a notice, according to the form numbered 10, in schedule (B.), or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough; and every person so objecting shall also give (a) or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice, according to the form numbered 11, *in the said schedule (B.); and every notice of objection shall be signed by the person objecting." Under this section, the right to object depends, not upon the qualification of the objector, but upon the fact of his being on a list of voters. If there be more than one list of voters, the notice must specify the particular list [*12]

(a) Probably meaning "give to the person objected to, or cause to be left at his place of abode;" but the strict grammatical construction would seem to require the giving to be at the place of abode.

upon which the objector's name appears; otherwise, it does not give the information the legislature intended. One object in requiring this particularity may have been, to give the party objected to an opportunity of conferring with the objector, in order to ascertain the nature of the objection. [MAULE, J. I doubt whether the legislature contemplated any thing of the sort; such conferences would be very likely to lead to breaches of the peace.] The party objected to is entitled to such information as may enable him to see that the objector has a right to object. Under the reform act, there are three descriptions of persons entitled to vote—freemen, persons possessing reserved rights under s. 33, and 10 $\frac{1}{2}$ householders. In cities and boroughs having within them several parishes or townships, the lists of voters are very numerous: in Norwich, for instance, which consists of thirty parishes, there are sixty-one lists. It is obvious that a notice signed as this is, would, in such a case, afford no convenient information. In *Tudball*, app., *The Town-Clerk of Bristol*, resp., 5 M. & G. 5, 7 Scott, N. R. 486, 1 Lutw. Reg. Cas. 7, in the notice of objection, the objector described himself as, "William Tudball, of Hotwell Road, on the list of voters for the parish of Clifton:" the name of William Tudball appeared on the list of freemen of the city of Bristol, and there he was described as of the parish of Clifton: and the court held the notice to be insufficient. TINDAL, C. J., there says: "It appears to me that the party objecting in this *13] case has failed properly to *describe himself: he has followed the form No. 11, in the schedule, more closely than he should have done. He has entirely described himself as being 'on the list of voters for the parish of Clifton,' whereas in fact his name only appears upon 'the list of the freemen of the city of Bristol.' It may be that the lists of voters for the city are very numerous: any informality, therefore, of this sort would necessarily throw upon the party objected to a greater degree of difficulty in ascertaining by whom the objection is made, than the act of parliament contemplated." In *Barton*, app., *Ashley*, resp., 2 Man. Gr. & S. 4, 1 Lutw. Reg. Cas. 307, it was held that a notice of objection delivered to the overseers under this section, where there are more lists than one made out by them, must specify the particular list to which the objection refers. In *Knowles*, app., *Brooking*, resp., 2 Man. Gr. & S. 226, 1 Lutw. Reg. Cas. 461, the whole court agreed that the objector's sole title to object arose from the fact of his name appearing upon some list. [MAULE, J. The particularity required by the note appended to the form of notice to the overseers, applies to a matter which but for that note might be left general. That note has nothing to do with the objector's description.]

Kinglake, Serjt., for the respondent. This notice is in strict conformity with the statute. In the form of notice in the 2 W. 4, c. 45, Sched. (I.), No. 5, no such identification of the particular list is required, as is here insisted upon. And there is nothing in the registration ac

to render more precision necessary. The words "on the list of voters for the parish of —," can only be requisite where the objection applies to a person on the overseers' list. The case of *Barton*, app., *Ashley*, resp., has nothing whatever to do with the question; unless, indeed, an inference in favour of the respondent *can be drawn [14 from the opinion of MAULE, J., that, "provided the effect is preserved, strict compliance with the form may not be material." In *Tudball*, app., *The Town-Clerk of Bristol*, resp., the objector was a freeman of the borough, but his name did not appear on any list of voters for any parish. The court held that he had misdescribed himself; but they did not say that he should have described himself as being on the list of freemen of the city.

Assuming this to be an inaccurate description, it is precisely one of those inaccuracies that are cured by the 6 & 7 Vict. c. 18, s. 101, which enacts that "no misnomer, or inaccurate description, of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in any wise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood."

Byles, Serjt., in reply. The description of himself given by the objector here is clearly insufficient: it is as if he had said—"My name appears upon some one of the lists of voters for the borough of Lancaster." In *Wansey*, app., *Perkins*, resp., (*Quigley's case*), 7 M. & G. 127, 8 Scott, N. R. 954, 1 Lutw. Reg. Cas. 235, the objector was properly described as "on the list of voters for the company of patten-makers." All that the *overseers* want to know, is, who is the party objected to. But the party himself has a right to be accurately informed as to who is the person attacking his right. There is no pretence for the suggestion that this is an inaccuracy of description that is cured by the 101st section of the 6 & 7 Vict. c. 18.

*WILDE, C. J. The court would deem it to be its duty equally [15 to avoid requiring what the statute itself does not require, as to avoid encouraging the omission of that which the statute does require; and it is essential, in the construction of this act, especially to lay down such broad and distinct rules as may be intelligible to the minds of those whose conduct is to be guided by them. Adopting that view, let us look at the seventeenth section of the act of 6 & 7 Vict. c. 18, and at the form No. 11, in schedule (B.), to see what is the precise information the objector is called upon to furnish. The court has already held, in *Wansey*, app., *Perkins*, resp., (*Quigley's case*, *ut supra*), that one particularity in the notice No. 10, viz., the specification of the list, if there be more than one, to which the objection refers, is not to be imported into No. 11; and with good reason; for, the party must know upon

what list his name appears, but the overseers, or the town-clerk, do not. What information, then, does the legislature require by the form No. 11? Information as to the list upon which the objector's name is to be found. It has given an example, not strictly applicable to the present case, but still sufficient to denote what is intended:—"A. B. (place of abode;) on the list of voters for the parish of —;" evidently meaning to require the particular parish to be designated. We may collect from that that the legislature intended that reference should be made to the particular list upon which the name of the objector is to be found. The notice in the present case is signed—"Richard Farrer, &c.; on the list of voters for the borough of Lancaster." But the whole of the lists constitute, in one sense, but one entire list for the borough. The objector, therefore, does not do that which the statute requires, by *16] stating generally that he is on the list *of voters for the borough; or, at all events, he does not do it so distinctly and explicitly as it ought to be done. It is not enough to say that the notice is so framed that the required information may, with more or less difficulty, be obtained elsewhere.

If, then, the notice is insufficient in this respect, was it competent to the revising barrister, under s. 101, to treat it as a mere inaccurate description of the person, so denominated in the notice as to be commonly understood? Now, there is nothing before us to show that "the list of voters for the borough of Lancaster" is or can be commonly understood to mean the list of freemen of the borough, as contradistinguished from the general list of voters for the borough. The revising barrister has no power to dispense with any formality which the statute exacts. If the view that presents itself to my mind be accurate, this clearly is not such a misdescription as the 101st section was intended to cure, but an omission of one of the important things the legislature has thought fit to require, and one that we cannot dispense with.

For these reasons, I think the notice was insufficient, and that its insufficiency is not aided by the section last referred to; and, consequently, that the decision of the revising barrister was incorrect. The case of *Tudball, app., The Town-Clerk of Bristol, resp.*, is essentially different from the present, and does not at all break in upon the foundation on which my opinion is based.

COLTMAN, J. I have had considerable difficulty in coming to a satisfactory determination in this case: but, upon the whole, as the objector might, consistently with this notice, have been on one of the *parochial* lists only, I am disposed to agree with the lord chief justice in thinking it insufficient, and that the revising barrister's decision was erroneous.

*17] *MAULE, J. I am of the same opinion. The registration act, the seventeenth section of which is the subject of contention in the present case, was passed chiefly to remedy certain defects and inconveniences found in the operation of the 2 W. 4, c. 45. One of those

defects was, that, under section 47 of the last-mentioned act, and the schedule (I.), No. 5, appended thereto, viz. in the notice of objection to be given to the overseers or town-clerk, there was a want of convenient particularity, and that the act was totally silent as to notice to the party objected to.^(a) The spirit of the 6 & 7 Vict. c. 18, is, to afford additional facilities to parties in sustaining their right to be on the register, if they have it. The power to object is not given in respect of the party's franchise, but only in respect of his name being on some one list of voters for the city or borough.^(b) If the section in question had simply provided that every person having a right to vote, might give notice of objection, without prescribing any particular form of notice, I conceive, upon general principles, that the objector would have been bound to show what right he had to object; for, when a man has a power conferred upon him by act of parliament, of dealing with the rights of another, he must show distinctly that he falls within the description of *persons to whom such power is given. Whether that is so or not, reason and good sense would seem to show [*18 that it would be convenient that it should be so. The seventeenth section of the 6 & 7 Vict. c. 18, requires the notice to the party objected to, to be in the form given in sched. (B.), No. 11. It does not, however, limit the power, or the necessity, of giving notice, to the case of an objector whose name appears on a parish list. When, therefore, the form given in the act requires the objector to state that he is on a particular list of voters, I think it is impossible to say that a notice altogether omitting that information does accord with the act. The opinion expressed by TINDAL, C. J., in pronouncing the decision of the court in *Tudball*, app., *The Town-Clerk of Bristol*, resp., would have been wholly inapplicable to the case, unless the statute did, in the judgment of the court, require the objector, if on the list of freemen, to state so. Upon principle, therefore, as well as upon the clear words of the act, I think the objector has not in this case described himself sufficiently.

With regard to the 101st section, that applies merely to remedy a misnomer or inaccuracy of description of any person, place, or thing, where such person, place, or thing is so denominated as to be commonly understood; that is, for instance, where the party, intending to describe a parish list, fails to do it with sufficient particularity, as, where he calls

(a) The same section, however, required the overseers and town-clerk respectively, to publish lists of the parties objected to, in the forms given in sched. (I.), Nos. 7 and 9.

(b) In the case of a county voter—6 & 7 Vict. c. 18, s. 7—the right of objecting is given to every person who shall be “upon the register for the time being;” and, accordingly, in the form of notice of objection to be given to the overseers, sched. (A.), No. 4, the place of abode of the objector only is required: but, in the form No. 5, of notice of objection to be given to parties objected to by any person other than overseers, and to the occupying tenant of the qualifying property, the objector is required to state that he is on the register of voters for a particular parish. It is observable, also, that, in the case of county voters, the overseers are still required (by s. 8) to publish a list of the persons objected to, in the form in schedule (A.), No. 6.

it the parish of *St. George*, instead of *St. George the Martyr*, or gives the name of the saint in some commonly understood abbreviated form: it must, however, have exactly the same sense as the accurate expression. To bring this case within that section, therefore, we must suppose this notice to contain an inaccurate description or statement of *the party's being on the list of freemen of the borough*. That clearly is not the meaning of the notice: if it means any thing, it means that the objector's

*19] name is to be found on one of the four lists that are made out for the borough; which cannot be called an inaccurate, but commonly understood, way of saying that he is on the list of *freemen* of the borough. The clause was intended to apply only to cure inaccuracies of expression, and not to reconcile diversities of intention; and it would be dangerous so to extend its effect. I therefore think the voters were not properly called upon in this case to sustain their rights, and that the decision of the revising barrister must be reversed.

V. WILLIAMS, J., concurred.

Decision reversed.(a)

(a) See *Elliott*, app., *The Overseers of St. Mary Within, Carlisle*, resp., post, p. 76.

Borough of DARTMOUTH.

JOHN BEENLEN, Appellant, PERCY HOCKIN, Respondent.

Nov. 16.

A notice of objection under the 6 & 7 Vict. c. 18, s. 17, dated of the day and month, without the year, is insufficient.

The list of voters was signed by three of the overseers and one of the churchwardens, and the service of the notice of objection was upon another churchwarden, who had not signed the list:—*Held*, that the notice was well served.

PERCY HOCKIN, on the list of voters for the parish of St. Saviour's within the borough of Clifton-Dartmouth-Hardness, objected to the name of John Beenlen being retained upon the list of voters in the parish of St. Saviour's.

In the notice of objection given to the overseers, and also in the notice of objection given to the party objected to, the date was stated thus:—"Dated, this 22d day of August." These notices were, in fact, signed by the objector on the 22d of August, 1846.

*20] The notice of objection to the overseers of St. Saviour's was served on one of the churchwardens on the 25th of August, 1846.

The list of voters made out by the overseers of the said parish of St. Saviour's was signed by three of the overseers and one of the churchwardens of that parish, but was not signed by the churchwarden of that parish on whom the notice of objection was served.

It was objected—first, that the notices of objection were bad, forasmuch as they omitted to state the year in the dating thereof—secondly, that the service of the notice of objection given to the overseers was

bad, forasmuch as it was served upon a churchwarden of the parish who had not signed the list.

The revising barristers held the notices of objection to be good, and the service of that given to the churchwarden to be a good service; and expunged the name of John Beenlen from the list of voters for the said parish of St. Saviour's.

The cases of forty-seven other persons—twenty, on the list for the parish of St. Saviour's, and twenty-seven on that of the parish of Townstal—whose names were expunged from those lists respectively, under similar circumstances, were consolidated with the principal case.

If the court shall be of opinion that the notice of objection given to the overseers, and the notice of objection given to the party objected to, were, or that either of them was, bad, then the register is to be amended by inserting therein the names of all the said persons, in manner directed: or, if the court shall be of opinion that the service of the notice of objection to be given to the overseers was not a good service, then the register is to be amended, by inserting therein the names of the said John Beenlen and the said other persons erased from the lists, in manner directed.

* *Greenwood*, for the appellant. The first question in this case [*21 is, whether, in the date of the notices of objection given pursuant to the 6 & 7 Vict. c. 18, s. 17, (a) sched. (B.), Nos. 10 and 11, it is necessary to state the *year* as well as the day and the month. It will be contended on the part of the respondent, that, because the forms Nos. 10 and 11 omit the words "one thousand eight hundred and —," which are found in Nos. 6 and 7, the year need not be mentioned. The only object of inserting a date at all is, that the party to whom the notice is addressed, may ascertain with certainty from the instrument itself, that the notice is given within the proper time. The blanks in Nos. 10 and 11 would be sensibly filled up thus—"Dated, this *first* day of the *week*;" but that clearly would not be a compliance with the statute. So neither can this be. No good reason can be suggested why the year should be inserted in the notice of claim, and not in the notice of objection. Suppose the date were left in blank altogether; though this would be a literal compliance with the act, nobody would venture to contend that such a notice would suffice. It may be urged that this is a hard objection, and that the party could not have been misled. But the question is to be determined, as was observed by TINDAL, C. J., in *Wansey*, app., *Perkins*, resp., (*Quigley's case*, 7 M. & G. 141; 8 Scott, N. R. 967, 1 Lutw. R. C. 235,) "by any supposed hardship that may arise, but upon the consideration whether or not the notice of objection is in compliance with the act of parliament." The power to object, like any other private power, must be exercised strictly: *The King v. The Inhabitants of Spreyton*, 3 B. & Ad. 818.

The second question is, whether service of the notice of objection upon
 *22] a churchwarden who had not signed *the list, was good service.

The seventeenth section of the 6 & 7 Vict. c. 18, requires the notice of objection to be given "*to the overseers who shall have made out the list* in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough." This refers to ss. 13, 14, which require the overseers and town-clerk respectively, to prepare and publish lists of persons entitled to vote; s. 13 providing that "*the said* overseers shall sign such lists" so prepared by them. The seventeenth section does not direct the notice to be given to any one of the overseers, but "*to the overseers who shall have made out the list.*" The legislature evidently intended that the notice should be given to the officers who had been active in preparing the lists. [MAULE, J. The notice of claim, under sect. 15, is to be given to *the overseers*. By s. 101, notice to any one of them would be sufficient, though the claimant cannot know which of them will make out the list.(a)] The words of s. 15 are not so stringent as those of s. 17.

Kinglake, Serjt., for the respondent. The statute 6 & 7 Vict. c. 18, gives certain persons power to object, and requires them in the exercise of that power to give certain information to the party objected to. If that information be substantially given, in fair compliance with the act, all is done that is requisite. The seventeenth section requires the objector to give to the overseers or town-clerk, and also to the party objected to, a notice in the form, or to the effect, contained in the
 *23] schedule. [MAULE, J. The words "or to the like *effect" are omitted when speaking of the notice No. 11, to be given to the party.] The object of both notices is the same; and it has already been laid down more than once that a strict literal adherence to the forms is not necessary; *Allen*, app., *House*, resp., 7 M. & G. 157, 8 Scott, N. R. 987, 1 Lutw. Reg. Cas. 255; and in many cases is improper: *Tudball*, app., *The Town-Clerk of Bristol*, resp., 5 M. & G. 6, 7 Scott, N. R. 486; 1 Lutw. Reg. Cas. 7. [MAULE, J. You must not depart from the meaning, by too rigid an adherence to the words.] Indeed, if a *literal* compliance be sufficient, this objection is at once answered; for, neither in No. 10 nor in No. 11 is any mention made of the year, though it is in two preceding forms in the same schedule, Nos. 6 and 7. The omission of the year, therefore, in the forms Nos. 10 and 11, shows that in these notices it was not considered necessary to insert it: and, with reason; for, a new list being made out for each year, there is no other list of voters than the list for the current year to which the notice of claim or of objection can apply. The list itself bears no date.

(a) In towns, the lists are generally made out, not by the overseers, but by the vestry-clerk.

All that is material under sect. 17 is, that the notice of objection shall be served "on or before the 25th day of August." [MAULE, J. "In that year."] It is impossible the party could be misled by this notice, which is not "dated the 22d day of August," but "*this* 22d day of August." Whatever doubt there might be as to the *day* of service, there could be none as to the *year*. In *Humphries v. Cullingwood*, 2 B. & A. 642, 1 Chitt. R. 384, under 5 G. 2, c. 27, it was held to be no objection to the notice at the foot of a bill of Middlesex, that it wholly omits to state the year, or the word *next*; although, in the form given in the statute, a blank is left for the year. The court there said: "It is unnecessary to state the year, because the party, by *the statement [*24 of the day of the month, must understand that he is to appear at the earliest time to which the notice could apply." The same point was determined in the case of *The Weavers' Company v. Forrest*, 2 Stra. 1232. So, in *Steel v. Campbell*, 1 Taunt. 424, where the writ was tested on the 28th of November, 49 G. 3, (1808,) and was returnable in eight days of St. Hilary, but the notice erroneously required the defendant to appear on the 20th of January, 1808, for which irregularity it was moved to set aside the writ; the court observed "that, as the notice was to appear at the return of the writ, which was tested subsequently to January, 1808, no man could understand it to require an appearance in January, 1808. The defendant must know that his appearance was required at a future, and not a past day. It was, therefore, an immaterial mistake, which could do no harm, for, what other day could occur to him than the 20th of January, 1809? It was quite impossible that the party should not understand that to be the year intended." So, here, what other day could occur to the party than the 22d of August, 1846? The objector could not avail himself of the notice, without showing that it had been duly served on or before the 25th of August in that particular year. Bills of exchange, deeds,^(a) and other instruments,^(b) in the absence of date, are assumed to bear date from the acceptance or delivery. So, here, this is a good notice from the time of service.

There is no foundation whatever for the second objection. By sect. 10 of the 6 & 7 Vict. c. 18, the town-clerk is required to issue his precept to the overseers, calling upon them, amongst other things, to make *out lists of all persons entitled to vote in respect of the occupa- [*25 tion of premises of the clear yearly value of 10*l.* in their respective parishes. The churchwardens being, by 43 Eliz. c. 2, s. 1, overseers for all purposes, this precept is virtually directed to the churchwardens and overseers. By sect. 13 the overseers are required to make out, or cause to be made out, such lists; and, when made out, "the said overseers shall sign such lists." By the interpretation-clause, sect. 101, it

(a) Com. Dig. *Fait* (B. 3).

(b) See *Doe d. Green v. Roe*, 8 Scott, 385; *Doe d. Woodroffe v. Roe*, 5 Scott, N. R. 800.

is enacted, "that throughout this act, in the construction thereof, except there be something in the subject or context inconsistent with or repugnant to such construction"—"the words 'overseers,' or 'overseers of the poor,' shall extend to and mean all persons who, by virtue of any office or appointment, shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed; and that all matters by this act directed to be done by the overseers of a parish or township, may be lawfully done by the major part of such overseers; and that, wherever any notice is by this act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers," &c. Then, sect. 17 requires a notice of objection to be given "to the overseers who shall have *made out* the list in which the name of the person so objected to shall have been inserted;" not to the particular overseers by whom it happens to be *signed*. The statute was dealing with cities and boroughs comprising a variety of parishes or townships: and the sole object of this provision was, to secure the service of the notice on the overseers of the right parish or township. The notice is to be addressed to the overseers *26] generally: there is nothing in the act to require it to be served *upon any one of the overseers who has by his signature authenticated the list. [WILDE, C. J. The thirteenth section requires the signatures of *the said* overseers who made out the list.] That which is required to be done, is considered as the act of the whole body. The interpretation clause is little more than a reiteration of what the law would have implied without it. The act of the majority of the churchwardens and overseers, will, in all cases, be binding on the minority. It was merely introduced for greater caution.

Greenwood, in reply. This notice is not required to be sent to the overseers of a parish generally, but to a particular class of overseers, viz. those who shall have made out the list. [MAULE, J. By sect. 13, the lists are to be made out and signed by "the overseers," that is, by *all* the overseers. By sect. 17, the notice is to be given to "the overseers who shall have made out the list." Now, who are the overseers who made out the list? Taking those two clauses alone, I should say *all* the overseers. Then, bringing the interpretation clause to bear on the matter, we find that this may be done by a majority of them; and, further, that a notice of any sort that is by the act required to be given to the overseers, may be served on any one of them.]

With respect to the date, the omission of the year is clearly fatal. The cases referred to are quite beside this. The English notice in *Humphries v. Cullingwood* had reference to something to be done at a future time; whereas, a date speaks of a thing present or past. This act requires the notice to be dated. The year being omitted, how can it be said that the document has that which, in ordinary legal intend-

ment, amounts to a date? Merely giving the day and the month, is neither a substantial nor a literal compliance with the act.

*WILDE, C. J. This is an act of parliament of recent date, [27 some of the provisions of which have not yet received a judicial construction : and it is an act of such a nature that it is extremely difficult to draw any analogy from other acts having different objects in view. Where the terms of a particular clause are free from doubt and ambiguity, we are not at liberty to introduce doubts from supposed analogies to other parts of the act. Although I feel that the parties may possibly have been misled, I cannot bring my mind to doubt what was the intention of the legislature. I collect from the language of section 17, and of the forms Nos. 10 and 11, in schedule (B.), that the notice is to be dated : and, though in some of the preceding forms words are introduced showing more distinctly that the year is intended to be inserted, I think it sufficiently appears from every one of the forms that a date is required ; and unquestionably the year is an essential part of a true date.(a) Finding, then, that the legislature has required these notices to be dated, I do not feel myself at liberty to inquire into the reasons by which it may have been influenced. The word "dated," followed by "this ——— day of ———," does, I think, distinctly indicate that the document should have a true and perfect date, of which I consider the year an essential part. I therefore think these notices are defective, and that the decision of the revising barrister upon this point was wrong.

With regard to the second question, though not necessary to determine it, still it may be convenient that we should express the opinion we have formed upon it. I think my brother *Kinglake* has given it an effectual answer. The several clauses upon which it turns are the 10th, the 13th, the 17th, and the 101st. *The 10th section, which provides for the issuing of the precept by the town-clerk, directs, in general terms, that it shall be delivered "to the overseers of the poor of every parish or township" within the city or borough. The 13th section, following the general expressions contained in s. 10, enacts "that the overseers of every such parish or township" shall make out lists of persons entitled to vote, and goes on to provide that "the *said* overseers shall sign such lists." And s. 17 requires the notice of objection to be given "to the overseers who shall have made out the list" in which the name of the person objected to shall have been inserted. If we want to know what the legislature intended by adding these words—"who shall have made out the list"—I think we cannot fail to discover it by looking at the 101st section, by which, amongst other things, it is enacted, that, in the construction of the act, "the words 'overseers' or 'overseers of the poor' shall extend to, and mean, all persons who, by [28

(a) In *Corn. Dig. Fait*, (B. 3), it is said, that, if a deed "has the day of the month, but no year is mentioned, that is a void date;" citing 2 Roll. 27, l. 22.

virtue of any office or appointment, shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed; and that all matters by this act directed to be done by the overseers of a parish or township may be lawfully done by the major part of such overseers; and that, wherever any notice is by this act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any *one* of such overseers, or shall be left at his place of abode, or at his office, or other place for transacting parochial business, or shall be sent by the post, free of postage, or the postage thereof being first paid, addressed to the overseers of the particular parish or township, naming the parish or township, and the county, city, or borough respectively to which the notice to be so sent may relate, *29] without "adding any place of abode of such overseers." It seems to me that "the overseers who shall have made out the list" means no more than the overseers of the particular parish to which the list relates. If it had been intended by these words to point to the particular overseers who signed the list, I should have expected to find an exception in that respect engrafted upon the words of the 101st section. Taking the several clauses together, I think the act is not susceptible of such an exposition as will sustain this objection. In my judgment, the intention of the legislature is satisfied by service of the notice upon any one of the overseers whose duty it is, under section 13, to make out and sign the list, and that there is no distinction in this respect between an overseer who in fact signed it, and any other. This view is fortified by the remark of my brother MAULE, as to notices of claim, which may be given to any one of the overseers. Upon this second point, therefore, I am strongly impressed that the objection to the service of the notice is not a valid one.

COLTMAN, J. I am of the same opinion upon both points. No one could have entertained a doubt but that the year was necessary in dating this notice, if all the forms had been precisely like No. 11. The only hesitation has arisen from the circumstance of some of the preceding forms containing the words, "one thousand eight hundred." This slight discrepancy may possibly have arisen from the hasty manner in which alterations are sometimes made in bills during their progress in parliament. It was clearly intended that the notice should be *perfectly* dated.

The second objection is quite untenable. The seventeenth section requires the notice to be given to the overseers who shall have made out the list, without reference to who may have signed it. The list, *30] when *made out, is the list of all the overseers: and by section 101, it is declared sufficient if any notice required by the act to be given to the overseers, is given to *any one* of such overseers. To hold s. 17 to require the service to be upon the overseers who sign

the lists, would be to deprive the interpretation clause of its legitimate effect.

MAULE, J. I also am of opinion that the notice in this case was insufficiently dated, and does not comply with what the act requires. That part of the forms Nos. 10 and 11, which raises the question, is thus—"Dated, this — day of —." The plain and common understanding of that is, that the blanks shall be filled up with a day of some particular month of a particular year of the Christian calendar. I do not think the act would be complied with by the insertion of the day, the month, or the year of some other calendar, or the year of the Hegira, or the style adopted in France in her republican days, or the number of days from the commencement of the year. (a) The day is to be particularized in the ordinary and accustomed manner; and that is not done unless the year also is mentioned. Two other forms in the same schedule, Nos. 6 and 7, have been referred to; and it is said, that, as the year is expressed in those cases, it is not to be implied here. That argument assumes, that, where there are two modes of expressing the same thing, if both are used in the same instrument, it must be intended that they mean to convey something different. It is a very usual thing to vary the forms of expression in writing or speaking; but certainly, in any matter of business, it is better avoided. No inference, however, can fairly be drawn that something different is meant, because two different modes of expression that are equivalent are *used in the same document. [*31 It is clear to my mind that the natural and plain sense of the forms under consideration requires the year to be mentioned in the date; and the construction of these forms is not affected by the circumstance of a little more particularity being observed in some of the preceding forms. The case of *Humphries v. Cullingwood* has no application. The objection there did not arise upon the date of the document. The notice had reference to an act to be done at a future time; and in speaking of something to be done at a future time, as was well observed by Mr. *Greenwood*, any person of ordinary intelligence would understand the earliest practicable time to be intended. But when you are speaking of time past, no one can tell what year you mean unless you specify it. It is said that no person could be misled by this notice, inasmuch as it could refer to no other than the month of August, 1846. No doubt, it could only mean that, consistently with what ought to be done. But the legislature requires that to be expressed, and it must be expressed in clear and plain language. One may very well conceive that a practical inconvenience might arise from the omission of the year; for instance, a party might be objected to year after year, the objector speculating upon the chance of his not attending to sustain his right; seeing a notice in this defective form lying on his table,—having

(a) Or, "this twenty-second day of the eighth month?"

been delivered in his absence,—he might imagine it to be a notice applicable to some former year, and take no heed of it.

With respect to the other point, I agree with my lord and my brother COLTMAN that there is nothing in it. The thirteenth section of the 6 & 7 Vict. c. 18, in terms requires all the overseers to make out or cause to be made out certain lists, and it requires the said overseers to sign those lists. Then, sect. 17 requires the notice of objection to be given to “the overseers who shall have made out the *32] list” in which the name of the *person objected to shall have been inserted. Then comes sect. 101, which, taking as the subject-matter of its legislation all that precedes it, enacts “that all matters by this act directed to be done by the overseers of a parish or township may be lawfully done by the major part of such overseers; and that, wherever any notice is by this act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to *any one* of such overseers,” &c. Excluding the interpretation clause, sects. 13 and 17 would require the lists to be signed by, and the notices given to, *all* the overseers. By the operation, however, of the interpretation clause, notice to any one of the overseers is notice to them all.

WILLIAMS, J., concurred.

Decision reversed.

Borough (a) of NEW SARUM.

CHARLES RICHARD NORTON, Appellant, The Town-Clerk of
SALISBURY, Respondent. Nov. 16.

The court has no power to hear an appeal, where the respondent fails to appear, unless the appellant has served upon him a notice—under the 6 & 7 Vict. c. 18, s. 62—of his intention to prosecute the appeal, ten days *at least* before the first day appointed by the court for hearing appeals—that is, ten *clear* days, exclusive both of the day of service and of the day so appointed.

THIS was an appeal against a decision of the barrister appointed to revise the lists of voters for the borough of New Sarum, expunging the name of the appellant from the list of voters for the said borough,
*93] *in respect of a house in High Street, in the parish of St. Thomas.
The respondent not appearing.

Kinglake, Serjt., for the appellant, prayed that the decision of the revising barrister might be reversed,—upon an affidavit of service, on the 2d instant, upon the respondent, of notice of the appellant's intention to prosecute the appeal. [Master Park intimated to the court that the notice was insufficient; the sixty-fourth section of the 6 & 7 Vict. c. 18, requiring it to be given *ten days at least* before the day appointed for the hearing of the appeal, and there not being ten clear days be-

tween the day of the service and the day appointed for hearing the appeals for this term—Thursday, the 12th instant.] The court having appointed too early a day for hearing these appeals, there was no time to give ten clear days' notice. [WILDE, C. J. What is the date of the revising barrister's decision?] The 16th of October. [WILDE, C. J. Then there was ample time for giving notice.] The universal understanding, from the words of the sixty-second section, has been, that the notice to the respondent, as well as the notice to the master, must be given within the first four days of the term. If that be not the proper construction of the act it cannot be contended that there was no sufficient time. Taking *this* to be the day appointed for the hearing, the notice would be good. [WILDE, C. J. The day appointed was the 12th; the subsequent days are merely days of adjournment.] The court has power to extend the time: for, by sect. 64 it is provided, "that, if it shall appear to the court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the court to postpone the hearing of the appeal in such case, as to the said court shall seem meet." That proviso can only apply to a case of this sort; for, the revision of the lists must always be *completed [*34 before the first day of Michaelmas term.(a) [WILDE, C. J. Nothing can be more distinct than the sixty-fourth section. It seems to me that we have no power to hear this appeal.] This is not so much a question of jurisdiction as a question of practice. In *Newton*, app., *The Overseers of Mobberley*, resp., 2 Man. Gr. & S. 203, 1 Lutw. Reg. Cas. 335, the court acted upon the proviso, the appellant having been led by the respondents' conduct to refrain from giving the regular notice. [WILDE, C. J. That is not quite in point. The court there considered there was a surprise on the appellant, a little in the nature of fraud on the respondents' part.] There is something like surprise upon the party here.

WILDE, C. J. I should have been very glad to have been able to discover any reasonable ground for permitting this appeal to stand over, in order to admit of the notice being now given. But I find none. In dealing with this act of parliament, which has for the first time delegated to a court of law a duty of much interest to the community, it behoves us to confine ourselves as strictly as may be within the path the legislature has marked out for us. This appeal having been called on, and no one appearing on behalf of the respondent, the appellant produced an affidavit of service on the respondent, of notice of his intention to prosecute the appeal. Comparing the day of service of that notice with the day appointed by the court for hearing the appeals, it is found that there is not an interval of ten days, as required by the sixty-fourth section: and there is no suggestion that a reasonable time had not elapsed since the decision of the revising barrister was pro-

(a) 6 & 7 Vict. c. 18, s. 32.

*35] nounced, for giving such notice, provided due *diligence had been used. By section 62, certain conditions precedent are to be observed by the appellant, before he can be heard. That section enacts, "that every appellant who shall intend to prosecute his appeal shall, within the first four days in Michaelmas term next after the decision to which such appeal shall relate, transmit to the masters of the Court of Common Pleas, the statement in writing so signed by the said revising barrister as aforesaid, (a) and shall also therewith give or send a notice, signed by him, stating therein his intention to prosecute the said appeal; and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his said intention duly to prosecute such appeal, in the said court," &c. In the latter part of this clause, the length of notice is not mentioned. But, it being afterwards contemplated that cases might occur in which the respondent might not appear to sustain the barrister's decision, there is, in a subsequent clause, an express enactment to meet that. Section 64 enacts "that no appeal or matter of appeal whatsoever shall in any case (with an exception not material upon the present occasion) be entertained or heard by the said court, unless notice shall have been given by the appellant to the masters of the Court of Common Pleas, at the time and in the manner before mentioned; and no appeal shall be heard by the said court, in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the day appointed for the hearing of such appeal:" and then comes the proviso which has been somewhat relied on.—"Provided always, that, if it shall appear to the said court that there has not

*36] *been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case, as to the said court shall seem meet." In *Newton, app., The Overseers of Mobberley, resp.*, the court thought the proviso applicable, not because the notice had been waived by the respondent, but because they thought there was some colour for saying, that, by reason of the conduct of the respondent, there had not been a reasonable time for giving the notice. There is no suggestion, however, in this case, of any fact to justify the court in acting upon that proviso. The decision was come to so long ago as the 16th of October, and nothing occurred to prevent the appellant from giving his notice at once. It appears, therefore, to me that the condition upon which alone the power of the court to entertain the appeal rests, not having been observed, we are bound to decline to hear it.

COLTMAN, J. I am of the same opinion. The words "ten days at least" have received a judicial construction in *The Queen v. The Justices of Salop*, 3 N. & P. 286, 6 Dowl. P. C. 28, being held to mean the given

number of days, exclusive of the first and the last. The necessary ten days' notice, therefore, clearly has not been given in this case. No aid can be derived from the proviso in the sixty-fourth section; for, it is impossible to say that the appellant had not abundant time to give the proper notice.

MAULE, J. Ten days' notice at least has not been given in this case, the notice having been given on the 2d of November, and the day appointed for the hearing of the appeal being the 12th. In the case of *The Queen v. The Justices of Salop*, the Court of Queen's Bench decided that, under the 4 & 5 W. 4, c. 76, s. 81,—which *requires [*37 the parish appealing against an order of removal, to deliver to the overseers of the respondent parish a written statement of the grounds of appeal,—fourteen days *at least* before the first day of the sessions, the fourteen days must be clear days, exclusive of the day of delivery and of the first day of the sessions. I think that was a perfectly correct decision. The words "at least" must have some meaning: they must mean that the notice is to be so delivered that there shall elapse ten periods of twenty-four hours each (a) between the day of its delivery and the day of hearing. That has not been done here. The section requiring the notice to be given (s. 62) does not prescribe the quality of the notice: the *termini* are pointed out by s. 64. The sixty-third section (b) shows that the time of giving this notice has nothing whatever to do with the time of the hearing. The party whose duty it is to give the notice, ought to bestir himself to give notice as early as conveniently may be after the decision has been pronounced. I think it is perfectly clear that the sixty-fourth section prohibits us from hearing this appeal.

V. WILLIAMS, J., concurred.

Appeal dismissed.(c)

(a) Which periods must embrace ten *calendar days*.

(b) Which enacts "that the judges of the said Court of Common Pleas shall, as soon as may be after the fourth day of Michaelmas term in every year, make arrangements for hearing the appeals entered as aforesaid, and shall appoint such certain day or days, either in term time or in time of vacation, as they may think fit and necessary,—but as early as conveniently may be,—for the purpose of hearing and deciding such appeals; and the said judges shall cause public notice to be given of the time and place so appointed by them for that purpose, and of the order in which such appeals will be heard."

(c) See the next case. See also *Grover*, app., *Bontems*, resp., post, p. 70; *Pring*, app., *Excourt*, resp., post, p. 73.

*38]

*Borough of NEW SARUM.

CHARLES ADEY, Appellant, FREDERICK HILL, Respondent.
Nov. 19.

[See the syllabus to the preceding case.]

The court will not postpone the hearing of an appeal, in order to afford time to give the necessary notice, upon a suggestion that the difficulty has arisen from the circumstance of their having appointed an unusually early day for the hearing of appeals; there having been ample time to give the notice between the day appointed and the day on which the decision of the revising barrister was pronounced.

THIS was an appeal against the decision of the barrister appointed to revise the lists of voters for the borough of New Sarum, overruling an objection to the name of the respondent being retained on the list of voters for the said borough, in respect of property situate in the parish of St. Edmund, within the borough.

The decision of the revising barrister was pronounced on the 16th of October, and on the 2d of November the appellant gave notice to the master, and also to the respondent, of his intention to prosecute the appeal. The respondent not appearing, this case presented the same objection that arose in the last preceding case.

Cockburn, for the appellant, observed, that, unless the court felt that they could consistently grant some indulgence, by far the greater number of the appeals that had been entered must be dismissed; the universal understanding of the practice having been, that it was sufficient to give notice to the respondent at the time of entering the appeal, and the parties having, at the time of giving the notice, no reason to anticipate that it would turn out to be insufficient: and he suggested that the court might possibly feel warranted in adjourning the whole of the remaining appeals until next Hilary term, in order to give the appellants an opportunity of serving proper notices in the meantime.

*39] *WILDE, C. J. The court has considered with great anxiety what is the construction that ought to be put upon this act of parliament. The House of Commons has thereby, for the first time, dispossessed itself of an important part of its constitutional power, and delegated the exercise of it to this court; at the same time enacting various restrictions, to guard against any encroachment on the power it still preserves. In the matter under consideration, the authority of this court is defined in terms that are precise and distinct. The decision of the revising barrister is to be conclusive, subject to an appeal to this court under certain conditions. One of these conditions imposed upon the appellant is, that he shall give or send a notice, signed by him, to the respondent, stating his intention to prosecute the appeal; (a) and, to make this the more imperative and emphatic, a subsequent clause (b) enacts that "no appeal shall be heard by the Court (of Common Pleas),

(a) 6 & 7 Vict. c. 18, s. 62.

(b) Section 64.

in any case where the respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days *at least* before the day appointed for the hearing of such appeal." When the legislature is thus, for the first time, giving to a court of law (a) jurisdiction over rights that have always been the subject of such watchful jealousy, it is in a peculiar manner incumbent on the court to confine itself strictly within the limits prescribed for it. If any of the provisions of the act are too stringent, it is fitter for the legislature to relax them, than for this court to assume a power of extension and indulgence, where the *words of the act are precise and unambiguous. The court is of opinion that "ten days at least," means ten clear, full, [40 and complete days, and not nine days and fractions of other two days. Such being the opinion of the court, has this appellant performed the condition upon which alone the court has authority to hear his appeal? He clearly has not done so. A deliberate deviation from an enactment so express and positive in its terms, would induce a mischief much greater than any inconvenience that can arise from the blunder of the appellant in this case. Upon the ground, therefore, that the right of appeal against the decision of the revising barrister is given only upon a *condition* which has not been complied with in the present case, the court is unanimously of opinion that the appellant is not in a situation to be heard.

Postponing the consideration of the appeals to the next term, as suggested, would not have the effect of relieving the parties from the difficulty. The day appointed by the court for the hearing of the appeals would still remain the same. Unless, therefore, the court is prepared to act in a manner that would be wholly inconsistent with judicial gravity and decorum, by resorting to a mere subterfuge in order to get over a supposed difficulty, the objection that now presents itself would not be at all lessened by the lapse of time.

Appeal dismissed.(b)

(a) In the 6th volume of the Law Review, p. 377, it is stated that, formerly, questions as to controverted elections were decided by the ordinary courts. As to this somewhat startling proposition, see also 4 Law. Rev. 299.

(b) And see *Grover*, app., *Bontems*, resp., post, p. 70; and *Pring*, app., *Edcourt*, resp., post, p. 73.

*41]

*Borough of MALMESBURY.

HENRY GALE, Appellant, THOMAS CHUBB, Respondent.

Nov. 19.

The corporation of M. consists of four classes of burgesses or freemen—1. Capital burgesses (in whom alone was the right of voting prior to the passing of the reform act)—2. Assistant burgesses—3. Landholders—4. Free burgesses or commoners. Vacancies in the third class are supplied from the fourth by seniority, and, in the other classes respectively, by election.—*Held*, that one who was a member of the fourth class, *by right of birth*, before the 1st of March, 1831, and became a “capital Burgess,” by election, after that day, is not disqualified as an elector by the 2 W. 4, c. 45, s. 32.

HENRY GALE objected to the name of Hercules Player, and the names of seven other persons, being retained on the list of capital burgesses, being freemen, of the borough of Malmesbury, entitled to vote in the election of a member for the said borough. Service of the several notices of objection having been admitted, the facts of the case were agreed on both sides to be as follows:—

The corporation of Malmesbury consists of four classes of burgesses or freemen. The first class is composed of an alderman and twelve other burgesses or freemen, called “capital burgesses.” The second class consists of twenty-four burgesses or freemen, called “assistant burgesses.” The third class comprises forty-eight burgesses or freemen, called “landholders.” And the fourth class consists of an indefinite number of burgesses or freemen, called “free burgesses, or commoners.”

All persons becoming members of the corporation are first admitted thereto as “free burgesses, or commoners,” and so, in the first instance, become members of the fourth class, which is the lowest grade of freemen; and the qualification for a free Burgess or commoner appears by an entry in a book kept for recording the proceedings of the corporation of the borough, a *copy of which is annexed to, and is to be considered as a part of this case.(a)

(a) The entry was as follows:—“At a general court of the said borough, holden this 9th day of July, 1827, at the common hall called St. John’s, within and for the said borough, before C. Aaron, alderman, and R. Neate, &c. &c., capital burgesses of the said borough, for the general business of admitting free burgesses, heretofore generally called commoners, and stating and settling accounts, and especially (pursuant to public notice for the purpose given) for declaring the rights and qualifications which persons must have and possess effectually to claim admission as free burgesses, or commoners, and, as such, members of this corporation, and for what causes any of the said free burgesses or commoners, after their admission, may forfeit and lose their rights as such free burgesses or commoners, and may be disfranchised or removed, &c.

“This court, pursuant to the said notice, have inspected the books and other ancient and modern written documents of and relating to this borough, and have also examined the most ancient inhabitants of the said borough; and do therefore declare, and, as far as they can, determine, as follows, viz.—

“That every son of a free Burgess, or commoner, in his own right, he being at the time of claiming admission of the age of twenty-one years, and married, and also a parishioner of one of the parishes within the borough, and likewise at the same time being an inhabitant householder in an entire tenement (and not an inmate) within the borough, is entitled to be admitted a free Burgess or commoner of this borough:

“That every man who has married a free Burgess’s daughter, he being at the time of claim

*As vacancies occur in the first-named three classes, they are all filled up from the fourth class, called free burgesses, or commoners, in the following manner:—A vacancy in the third class is supplied by the senior free burgess, or commoner, who thereupon becomes, of right, a landholder, without any election or appointment. When a vacancy happens in the second class, it is filled up by a member of the third class, by election, the electors being the capital burgesses and assistant burgesses forming the first and second classes: and, in the event of a vacancy in the first class, an assistant burgess, or member of the second class, is elected to supply such vacancy, by the remaining capital burgesses, or members of the first class. [*43]

Before the passing of the reform act, 2 W. 4, c. 45, the right of electing two members of parliament for the borough of Malmesbury had long been exercised by the thirteen capital burgesses or freemen only. By that act, the borough of Malmesbury was put into schedule (B.), and has since returned only one member; and the electors have consisted of such of the capital burgesses as were admitted free burgesses by right of birth, and 10 $\frac{1}{2}$ householders of Malmesbury and of the adjoining parishes.

The electors for the borough number at present about 330; of whom eight are on the register as capital burgesses. The remaining five of the thirteen capital burgesses were originally admitted freemen by right of marriage; but they have been omitted from the list of freemen, by the town-clerk, in consequence of three persons who were capital burgesses by right of marriage, having been some years ago objected to, and expunged by the revising barrister, on the ground that *freemen by right of marriage were, by the thirty-second section of. [*44] the reform act, excluded from voting.

Hercules Player, the above-named person objected to, was duly admitted a free burgess, or commoner, on the 21st of June, 1808, *by right of birth*, having been the son of a free burgess duly admitted before Hercules Player was born; and the said Hercules Player possessed all the other requisite qualifications to entitle him to become a member of

ing admission so married, and his wife living, (but not otherwise,) he being also of the age of twenty-one years, and a parishioner of one of the parishes within the borough, and an inhabitant householder in an entire tenement (and not an inmate) within the borough, is entitled to be admitted a free burgess, or commoner, of this borough; but, a free burgess's daughter having once married, cannot communicate to a subsequent husband a right to admission; nor will such subsequent marriage give to the sons or daughters of such husband by another wife any right to admission:

"That no son of a free burgess born before his father shall have been admitted in court a free burgess, is entitled to be admitted a free burgess:

"That no daughter of a free burgess born before her father shall have been admitted in court a free burgess, can communicate to, or invest any husband of her with, any right or title to be admitted a free burgess:

"Disqualifications and causes for rejection and removal, viz.—conviction of felony, either before or after admission,—not being, at the time of admission, or at any time after admission ceasing to be, an inhabitant householder in an entire tenement within one of the said parishes within the borough."

the corporation. He afterwards became successively a landholder, and assistant burgess, and finally, on the 2d of June, 1834, was elected a capital burgess of the corporation. He has ever since his admission in 1808 been an inhabitant householder, in an entire tenement, (and not an inmate,) within the old borough of Malmesbury, and has been duly registered as a freeman entitled to vote for a member of parliament for the borough, ever since his election as a capital burgess.

The objection made to Hercules Player being on the list of freemen, is, that he is excluded by the thirty-second section of the reform act, because he was elected a capital burgess subsequently to the 1st of March, 1831, and the title by which he claims a right to vote, accrued since that period, by election as a capital burgess, and not as a freeman by birth; and that, in fact, all the capital burgesses previous to the passing of the reform act, voted, not by right of birth or of servitude, or of marriage, but as elected capital burgesses.

On the other hand, it was contended, that, as the original right of Hercules Player to admission as a burgess or freeman was in respect of birth, and that right was the foundation of every subsequent advancement in the borough, until his right to vote as a capital burgess became matured under the law as it stood before the passing of the reform act, he came within the provision of the thirty-second section of that act, *45] which reserves *the right to vote in favour of a person thereafter elected, made, or admitted a burgess or freeman in respect of birth; and that the case was entirely free from the mischief intended to be guarded against by the act, of inundating the constituency, the number of voters in Malmesbury being limited to thirteen. And it was urged that the effect of a decision to the contrary would be to disfranchise all the capital burgesses, and leave the corporation unrepresented.

The revising barrister decided, upon these facts, that Hercules Player was a person entitled to vote as a burgess and freeman elected and admitted in respect of birth; and he retained his name upon the list of freemen.

The validity of the objections to the names of the seven other persons depending upon the same statement of facts, and upon the same point of law, their cases were consolidated with the principal case, and the town-clerk of the borough of Malmesbury named the respondent in such consolidated appeal.

The question for the opinion of the court is, whether, under the circumstances mentioned in the above statement of facts, the said Hercules Player and the said seven other persons named in the said list, are persons entitled to vote as burgesses and freemen admitted in respect of birth. If the court are of that opinion, then the list is to stand without amendment. If the court are of a contrary opinion, then the name of Hercules Player and those of the said seven other persons are to be expunged from the said list.

Cockburn, for the appellant. The question in this case turns upon the construction of the thirty-second section of the 2 W. 4, c. 45, which enacts "that every person who would have been entitled to vote in the election of a member or members to serve in any future *parliament for any city or borough not included in the schedule marked [46 (A.) to this act annexed, either as a burgess or freeman, or, in the city of London, as a freeman and liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained." And, after providing for residence, the clause proceeds:—"Provided always, that no person who shall have been elected, made, or admitted a burgess or freeman since the 1st day of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman, otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid: Provided also, that no person shall be so entitled as a burgess or freeman, in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st day of March, 1831, or from or through some person who since that time shall have become, or shall hereafter become, a burgess or freeman in respect of servitude." Was Player entitled to be elected a burgess or freeman in respect of birth or servitude at the period named in the act? He was duly admitted a "free burgess or commoner," by right of birth, prior to the 1st of March, 1831. He afterwards successively became an "assistant burgess" by seniority, and a "landholder" by election. In June, 1834, he became a "capital burgess" not as matter of *right*, but by *election*; and therefore he is not within the exception in section 32. [WILDE, C. J. Your argument would exclude from the right to be registered all capital burgesses elected since the 1st of March, 1831.] Precisely so. The act intended to preserve certain existing rights. Election *imports choice. [MAULE, J. [47 The act assumes that there may be persons elected or admitted burgesses or freemen since the 1st of March, 1831, who may be registered. WILDE, C. J. There was probably no clause in the whole bill that was more debated in parliament than this thirty-second. I cannot entertain the least doubt upon it.] A construction in favour of this person's right to be registered will let in a large portion of the mischief the statute designed to remedy.

WILDE, C. J. It is quite clear that the legislature, by the thirty-second section of the reform act, intended to preserve rights like the present as they existed before the 1st day of March, 1831. Player had before that day a right to vote as a burgess or freeman in respect of birth, provided he should be subsequently elected. The line must be drawn somewhere. The legislature has made it necessary that the party

should be elected in respect of a right by birth or servitude possessed by him before the day mentioned, or in respect of a right by birth derived from or through some person who was, or was entitled to be admitted, a burgess or freeman previously to that day, or from or through some person who since that time shall have become a burgess or freeman in respect of servitude. This individual was born under circumstances which made him eligible as a capital burgess when election should become necessary. He therefore does not fall within the exclusion of the first proviso in sect. 32. The legislature never intended to take away inchoate rights of this description.

The rest of the court concurred.

Arnold, for the respondent, asked for costs.

*48] *Cockburn*, *contrà*, observed that the case was one that fairly admitted of doubt, and that the revising barrister had invited an appeal.

Per curiam. We do not think there is doubt enough to exempt the appellant from the payment of costs. Decision affirmed, with costs.

County of WESTMORELAND.

THOMAS BUSER, Appellant, JOHN THOMPSON, Respondent
Nov. 19.

A. claimed to vote in respect of a burgage tenement in an ancient borough. The case found that burgage tenements within the borough had always been conveyed by deed or grant, or bargain and sale, without livery of seisin, and without a lease for a year, or any enrolment; that no surrender or admittance was required, nor was any fine paid upon descent or alienation; that the mode of descent was agreeably to the common law, except that females inherited, not as coparceners, but by seniority; that the interest of a *feme covert* was passed without any separate examination of the wife; that the widow of a person dying seised of a burgage tenement had the whole during her chaste widowhood; that burgage tenements had always been devisable in the same way as ordinary freeholds; (a) that they were held subject only to the payment of certain fixed annual rents payable to some individual; and that no other services had been performed or payments made in respect of them:—

Held, that, in the absence of evidence on the face of the case to show that the freehold was in any other person, it must be assumed that A. had such a freehold tenure as to entitle him to be registered, the value being sufficient.

THE claim of Thomas Buser to have his name inserted in the list of voters for the township of Kendal, and Park and Castle lands, was objected to. The claim was as follows:—

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, Lane, &c., where the Property is situate, &c.
Thomas Buser.	Highgate Kendal	One third Share of Burgage Houses and Garden.	Head of Captain French Lane.

(a) Vide post, p. 50, n. (a).

*Thomas Busher is one of the owners of certain houses situate within the township, and within the limits of the ancient borough, of Kirkby-in-Kendal. The houses are what is called burgage tenure; and Thomas Busher's interest in the annual value of the said houses exceeds 40s., but is less than 10*l*. [*49]

Besides the tenements held by burgage-tenure,—of which there are many,—there are other tenements within the borough which are of ordinary tenure—of free and common soccage—and which are conveyed by the mode of assurance adapted to the passing of freehold estates, and descend according to the rules of the common law.

The burgage-tenure within the township differs from the ordinary freehold tenure, in this, that burgage tenements have always been conveyed by deed of grant, or bargain and sale, without livery of seisin, and without a lease for a year, or any enrolment. No surrender or admittance, however, is required; nor is any fine paid upon descent or alienation. There is no record of courts-baron, or customary courts, having ever been held within the township; though a tradition exists that such courts were formerly held, and that, upon every change of tenant of a burgage tenement, a “God’s penny” only was paid, but no fine.

The mode of descent of such burgage-tenements follows the common law mode of descent, excepting that, where, by the common law, several females would inherit as coparceners, by the custom of burgage-tenure, the eldest inherits to the exclusion of the rest.

The custom with regard to *femes covert* has always been, that husband and wife have conveyed the burgage tenements of the wife, by such deed of grant, or bargain and sale, as before mentioned, and without any separate examination of the wife; and that, upon the death of a person dying seised of a burgage tenement, and leaving a widow, such widow, instead of dower by the common law, has had the whole of the burgage tenements of which her husband died seised, during her chaste viduity; but such widow has had no dower or free-bench out of any tenement conveyed by the husband during coverture—her title to such dower or free-bench, being confined to the tenements or estate of which the husband *dies* seised. In the township of Kirkland, which adjoins the township of Kendal, but is without the limits of the ancient borough of Kirkby-in-Kendal, there are burgage tenements, the customs with respect to which, as to alienation, descent, and in all other respects, are the same as apply to burgage tenements in Kendal, except that, upon alienation, the deed of alienation is presented at the manor court; but no admittance takes place. There are copyhold tenements within the manor of Kirkland. [*50]

Burgage tenements have always been devisable in the same manner as ordinary freehold estates.(a) They are held subject only to the pay

(a) Before the statute of wills, freehold lands were devisable only by local custom. Under that statute they might, as to two-thirds of lands held by knight's service, and as to the whole

ment of certain fixed annual rents, some of which are payable to the lords of the manor, and others to private individuals, who have an undoubted right to enforce payment of these fixed annual rents, by entry and distress. No other services have been performed, or payments made, in respect of these burgage tenements.

The owners of these tenements voted, in respect of these burgage tenements, at the elections for the county of Westmoreland, in 1818, 1820, 1826, and 1832; but, whether they did so in the exercise of an admitted right, or by mutual consent, was not shown.

There are within the barony of Kendal (within which the borough of
*51] Kirkby-in-Kendal is situate) divers *customary tenements, which are conveyed by deed of grant, or bargain and sale, without surrender; but with regard to which, upon every change of tenant, by alienation, descent, or devise, as well as upon the death of the lord, admittance at the manor court is necessary; and fines (some arbitrary, but for the most part certain,) and, in some instances, heriots, are payable. The owners of these customary tenements also perform suit and service at the customary courts, which are regularly held within the several manors. In other respects, the customs as to descent, and as to a widow's estate in her husband's lands, and as to the power of disposition by will, are the same with regard to burgage tenements and to the customary tenements alluded to.

It was contended, on behalf of Busher, that the houses were of freehold tenure, and that an interest to the extent of 40s. by the year was sufficient to support his claim.

The revising barrister decided, that the houses were not of freehold tenure; and that, as their clear yearly value to Busher did not amount to 10*l.*, they were insufficient to support his claim.

Cockburn, (with whom was *Stock*,) for the appellant. The question is, whether the houses, in respect of an interest in which the appellant claimed to be registered, are of freehold or customary tenure. The distinction pointed out in *Heywood on County Elections*, ch. 3, pp. 77—85, is, whether the intervention of the lord is or is not necessary to perfect the alienation. [WILDE, C. J. What is there in the statement submitted to us importing that the fee is in the lord?] Nothing. [MAULE, J. The question seems to be, whether there may be a valid custom to pass lands without livery.] LITTLETON, treating of tenure in burgage, says,
*52] ss. 162—167: "Tenure in burgage is, *where an ancient borough is, of which the king is lord, and they that have tenements within the borough hold of the king their tenements, that every tenant for his tenement ought to pay to the king a certain rent by year, &c. And such tenure is but tenure in socage." "And the same manner is, where another lord spiritual or temporal is lord of such borough, and the

of those held in socage, be devised by will in writing; upon which, however, certain restrictions were imposed by the statute of frauds, and others by the 7 W. 4, & 1 Vict. c. 26.

tenants of the tenements in such a borough hold of their lord, to pay each of them yearly an annual rent." "And it is called tenure in bur-
gage, for that the tenements within the borough be holden of the lord of the borough by certain rent, &c. And it is, to wit, that the ancient towns called boroughs, be the most ancient that be within England; for, the towns that now be cities or counties, in old time were boroughs, and called boroughs; for, of such old towns called boroughs, come the bur-
gesses of the parliament to the parliament, when the king hath sum-
moned his parliament." "Also, for the greater part, such boroughs have divers customs and usages which be not had in other towns: for, some boroughs have such a custom, that, if a man have issue many sons, and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father, by force of the custom; the which is called borough English." "Also, in some boroughs, by custom, the wife shall have for her dower all the tene-
ments which were her husband's." "Also, in some boroughs, by the custom, a man may devise, by his testament, his lands and tenements which he hath in fee-simple within the same borough at the time of his death; and, by force of such devise, he to whom such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him after the form and effect of the devise, without any livery of seisin thereof to be made to him, &c."

[MAULE, J. Do you find any instance of a custom *to convey without livery of seisin, other than a custom to devise?] No. [*58
There is no evidence of the existence of any manor here, or any lord: the tenements in question are merely stated to be held subject to the payment of a fixed rent to an individual, no information being given as to the amount so paid, or of the person to whom it is paid. By the operation of the statute 12 Car. 2, c. 24, all tenures, with the exception of tenures in frankalmoigne, tenure by copy of court roll, and the honorary services of grand serjeanty, are converted into free and com-
mon socage. [MAULE, J. That statute does not apply to copyholds: its object was to turn knight's service, and tenures of that description, into free socage.] Where nothing is shown to the contrary, every tenure is presumed to be a free socage.

Arnold, for the respondent. The question turns upon the nineteenth section of the 2 W. 4, c. 45, which enacts "that every male person of full age, and not subject to any legal incapacity, who shall be seised, at law or in equity, of any lands or tenements of copyhold or *any other tenure whatever, except freehold*, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county, or for the riding, parts, or division of

the county, in which such lands or tenements shall be respectively situate." The case states that the tenements here are of burgage tenure. The tenures spoken of by Littleton, in the sections referred to, and also by Blackstone, (a) are clearly frank tenures. "Tenure in *54] burgage," says Blackstone, * "is described by Glanvill, lib. 7, cap. 8, and is expressly said by Littleton, sect. 162, to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough is distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is, where houses, or lands which were formerly the scite of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent." There are in the present case, certain peculiarities showing that the houses in question are not of free tenure; but rather in the nature of those copyhold or customary tenant rights peculiar to the north of England—derived from the old tenures, not in pure villenage, but a kind of villein socage. It is not necessary that there should be admittance: still the freehold is not in the tenant. The case of *Roe d. Clemett v. Briggs*, 16 East, 406, shows, that the freehold in these tenements cannot be in the tenant without enfranchisement. [MAULE, J. The tenements in that case were within the manor of Kirkland.] In *Doe d. Reay v. Huntington*, 4 East, 271, which is an authority to the same effect, LAWRENCE, J., *arguendo*, observes, "that the tenant of a customary estate might have a *freehold interest*, though not a *freehold tenure* in it, according to Mr. Justice Blackstone's distinction, in his Tract on Copyholders." (b) And Lord ELLENBOROUGH, in delivering judgment, says: "These customary *55] estates, known by the denomination *of *tenant-right*, are peculiar to the northern parts of England, in which border-services against Scotland were anciently performed, before the union of England and Scotland under the same sovereign. And, although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure, either pure or privileged, (and out of one or other of these species of villenage all copyhold is derived,) and also have some which savour more of military tenure by *escuage uncertain*, which according to Littleton, § 99, is *knight's service*; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz. the being holden at the will of the lord, and also the usual evidence of title by copy of court roll, and are alienable also contrary to the usual mode

(a) 2 Bl. Comm. 82—84. And see Wright's Tenures, 205.

(b) Considerations on Copyholders, p. 109, *et seq.* and see 2 Bl. Comm. 149.

by which copyholds are aliened, viz. by deed and admittance thereon (if, indeed, they could be immemorially aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, which at common law could only have transferred the use:) I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question. In the case of *Stephenson v. Hill*, 3 Burr. 1278, Lord MANSFIELD and DENNISON, J., considered it to be a settled point, that, in the case of customary estates, 'the freehold was in the lord.' And in the very late case of *Burrell v. Dodd*, 3 B. & P. 378, the Court of Common Pleas expressly held these customary tenant-right estates not to be freeholds.^(a) It may be *difficult, [*56 perhaps, to show where the freehold is: probably it is in the lord of the barony of Kendal. The case states, in the first place, that these burgage tenements have always been conveyed by deed of grant, or bargain and sale, without livery of seisin, and without enrolment. In the second place, it states that females inherit, not in coparcenary, but the eldest, to the exclusion of the rest. In the third place, the property of a *feme covert* is conveyed by the husband and wife, without any separate examination of the latter. And in the fourth place, the widow of a man dying seised of a burgage tenement, takes the whole, during viduity, and not, as at common law, a third. It may be conceded that the second and fourth of these peculiarities in this tenure, are not inconsistent with its being freehold: Litt. § 37; Scriven on Copyhold, 4th edit. 72; Watkins on Copyholds, ch. 3, p. 87, (2d edit. 96.) But the other two properties of these tenures are utterly irreconcilable with the tenants having a freehold. The only modes by which freeholds could at common law be conveyed, *inter vivos*, was, by feoffment and livery of seisin: 2 Bl. Comm. 311; 1 Steph. Comm. 218. A grant or bargain and sale, without enrolment, would be inoperative to pass a freehold interest. [MAULE, J. Without a custom. I cannot help thinking that there are customs to convey burgage tenures by deed, without livery of seisin. *Cockburn*, adverted to the custom of London.](b) The revising barrister has stated no custom; and he has found that these houses are not of freehold tenure. Then, as to the conveyance of the estate of a married woman. At common law, such a conveyance of the property of a married woman would be absolutely void: Perkins, s. 154. The circumstance of these tenements being devisable, is not inconsistent *with their being of base tenure. [*57 [MAULE, J. There is a total absence here of any evidence of base tenure. It is not shown in whom the freehold is, if not in the

(a) See *Thompson v. Hardinge*, ante, vol. i. p. 942.

(b) See Com. Dig. tit. *Bargain and Sale*, (E. 4), (E. 5); tit. *London* (N. 3).

tenants. The only difficulty is, as to the mode of conveyance. In order to decide the case, it will not be necessary to hold, in the abstract, that there may be a good custom to convey a *freehold* by grant, without livery of seisin. It is enough if there may be a valid custom to convey a *burgage tenement* by grant, without livery. The case finds that there are within the township other tenements which are of the ordinary tenure of free and common socage. If, therefore, there be this custom, it is not a general custom, but a custom applicable only to *burgage tenements*.]

Cockburn, in reply. The distinction is clearly laid down, in the authorities cited, between freehold and base tenures. There is nothing but the single circumstance of the mode of conveyance that can at all justify a surmise that the tenements in question are other than freehold. In *Cruise's Digest*, vol. i. c. 3, s. 29, speaking of *burgage tenures*, it is said, that "the qualities of this tenure vary according to the particular customs of every borough, without prejudice to the feudal nature of it; in conformity to the maxim, "*consuetudo loci est observanda*." [WILDE, C. J. Neither *Cruise* nor *Lord Coke* refers particularly to the mode of conveyance.] It may be that these tenements were originally held in ancient demesne, or of customary tenure, and have been enfranchised. That, however, is mere conjecture. The presumption of law is, that the freehold is in the party who is in possession of land, until the contrary is shown.

WILDE, C. J. The sole question in this case seems to be, whether or
*58] not the interest in respect of which **Busher*, the appellant, claimed to be put upon the register, was of a freehold nature. If it be so, the value is sufficient to confer upon him the franchise, otherwise not. The case finds that *Busher* is the owner of a *burgage tenement*, subject only to the payment of rent, the amount of which is not mentioned, nor the person to whom it is payable. The tenements are not situate within any manor, nor is there any lord: they are held subject to the payment of rent to an individual. Now, where a party is simply in possession of property, and nothing more appears, what is the interest which in law he is presumed to have? and what is the inference in the present case to rebut that presumption? With regard to the enjoyment, we find all the incidents of a freehold tenure, and an entire absence of any symptoms of a base tenure, or any thing to show that the party's interest is less than a freehold. It is found that the owners of these tenements voted in respect thereof at several elections for the county, as freeholders. What right have we to infer that they voted in pursuance of some private arrangement? There is absolutely nothing to cut down the ordinary legal presumption arising from possession, that the party is possessed in respect of a freehold tenure. The only ground upon which it has been contended that this is less than a freehold tenure, is, that these *burgage tenements* have always been

conveyed by grant or bargain and sale, without livery of seisin, and without a lease for year, or any enrolment; and that, in the case of husband and wife, the conveyance has always been by deed of grant or bargain and sale, and without any separate examination of the wife. It was observed by one of my learned brothers, in the course of the argument, that there is no instance to be found of a custom to convey a tenure of a base nature without livery of seisin. If this form of conveyance may be sufficient to pass a freehold interest, it is competent to *the court to give effect to it, in the absence of any circumstances
 .so show that it is inapplicable to the subject-matter of discussion. [*59

As far as any evidence appears on the case, it has been the mode of conveyance of these tenements from time immemorial. There is no period at which any services of a base nature were performed; and no evidence that there ever was a manor of which these tenements formed part: but there is evidence that there is no manor existing now, and therefore no lord. When it is argued that the party in possession is not entitled to the fee, surely one should require to be told where the freehold is. When, therefore, I find an entire absence of any thing like base service, or of the existence of a manor, or of any person holding relation to the lord in whom the freehold could be, I certainly feel myself at liberty to refer the possession of the appellant to a freehold interest, notwithstanding the mode of conveyance is not strictly reconcilable with the common law. It seems to me, therefore, that, though we may find many, perhaps all, the incidents applicable to these burgage tenures in cases where the party clearly had no freehold interest, yet we always find them accompanied with qualifying circumstances which are wanting here. For these reasons, it seems to me that the proper legal inference to be drawn from the facts stated, is, that the appellant was possessed of a freehold interest sufficient to sustain his claim, and therefore that the decision of the revising barrister must be reversed.

COLTMAN, J. It seems to me also that the decision of the revising barrister in this case is erroneous. Where a party is in possession of property, he is *prima facie* the owner of the fee; and he who seeks to reduce his interest must show the circumstances and ground for so doing. Now, it is not shown that the parties here *held under any one
 who was lord of the manor, or in any way possessed of the free- [*60
 hold. The original grant of these tenements may have been before the statute of *Quia Emptores*, Westm. 3, 18 Edw. 1, c. 1. The only circumstance that can be relied on as raising a doubt in this case, is, the mode of conveyance. Reference has been made to the custom prevailing in the city of London, where houses and lands pass by bargain and sale enrolled. Lord Coke speaks of that custom in his exposition of the statute 27 H. 8, c. 16, in the 2d Institute. Before the statute of uses, (27 H. 8, c. 10,) a use might be conveyed by parol; by that statute, it was converted into a legal estate. But then the 27 H. 8, c. 16, made

another circumstance necessary to give validity to the title under a conveyance by bargain and sale, viz. enrolment. That statute, however, contained an exception in favour of cities, boroughs, and towns corporate, in the following words: "Provided always that this act, nor any thing therein contained, extend not to any manor, lands, tenements, or hereditaments, lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority, or have lawfully used to enrol any evidences, deeds, or other writings, within their precinct or limits; any thing in this act contained to the contrary notwithstanding." Upon this Lord Coke says^(a) it was "resolved, by the opinion of the justices of both benches, that a bargain and sale, for valuable consideration, of houses or lands in London, &c., by word only, is sufficient to pass the same; for that houses and lands in any city, &c., are exempted out of this act: and at the common law such a bargain and sale by word *61] only, raised an use. And the statute *of 27 H. 8, c. 10, doth transfer the use into possession. When the makers of this act had appropriated the enrolment of all indentures of bargain and sale to the king's four courts aforesaid, it was necessary to make a provision for cities, &c., which had authority to enrol, and that there such bargains and sales should be enrolled. *Sed desunt verba*: for, by the words, the manors, lands, tenements, and hereditaments, are exempted out of the said act, without any provision for enrolment within those cities, &c." I should have been disposed to think that this had been a borough where enrolment was necessary. But there is a finding in this case, which, if it be correct, and advisedly inserted in it, shows that this is not a borough that is within the benefit of that provision of the 27 H. 8, c. 16, viz. that there is no enrolment of conveyances of these burgage tenures. We are not, however, now trying whether or not this conveyance is a valid one, but whether the tenure is freehold. If it be true that the conveyances never were enrolled, I feel some difficulty in saying that they would pass the freehold. There is nothing, however, in the circumstance of the conveyance being by deed, without livery of seisin, and without enrolment, that necessarily leads to the conclusion that the tenure is base. The same remarks apply to the conveyance of the estate of a *feme covert*.

MAULE, J. I also think it must be presumed that the tenure in question is freehold, in the absence of any evidence to warrant the contrary conclusion. That which the case finds as to the mode of conveyance, does not apply to the conveyance under which these parties claim, but to the customary mode of passing burgage tenures in this borough. It might be that there never was any conveyance of these tenements; they may have descended from ancestor to heir from

(a) 2 Inst. 675, referring to *Chibborne's case*, Dyer, 229 a.

*time immemorial. The only question for our consideration is, whether this tenure is other than freehold. If it is, it must be in consequence of its being held of some lord by base tenure: but there always is in such cases some symbol or badge of the baseness of the tenure, some presentment at the homage that such a conveyance has been made, or admittance, or something to show a holding at the will of some lord. There is, however, nothing of that sort here. If we hold this to be not a freehold tenure, we must say that it is a base tenure of a kind we cannot discover, and held of some person who cannot be named. That clearly is not a legitimate way of depriving a man of his rights. The case finds that these burgage tenements are held subject to the payment of certain fixed annual rents, some of which are payable to the lords of the manor, and others to private individuals. I find nothing on the case that is sufficient to satisfy me that the tenure is base. The circumstance of the conveyance differing from the common law mode may be accounted for thus. It may be that there is an ancient custom in this borough to convey burgage tenements by bargain and sale, without livery of seisin, and without enrolment. Such a custom might be bad. But that would not be sufficient to reduce this to a base tenure. Affirmative evidence would be necessary for that purpose. A vast deal of land in this country that is held of free and common socage, is originally held of some one who cannot be pointed out. There being, then, in this case, a total absence of evidence to show that these tenements are of base tenure, I think the presumption of law is that they are of freehold tenure, and consequently that the decision of the revising barrister must be reversed.

V. WILLIAMS, J. I am of the same opinion. There may be some difficulty in seeing how the mode of *conveyance stated in the case, can be operative to pass the estate: but that difficulty would in no degree be lessened by holding these tenements to be of copyhold or base tenure. Decision reversed.

Borough of WARWICK.

THOMAS NICKS, Appellant, ALGERNON SYDNEY FIELD,
Respondent. Nov. 19.(a)

A party entitled, before the passing of the 2 W. 4, c. 45, to vote as an inhabitant householder paying scot and lot, does not, by the 33d section of that act, lose his qualification by having omitted for one year to pay his rates before the last day of July.

WILLIAM BRADLEY claimed to have his name inserted in the list of voters for the borough of Warwick, as an inhabitant paying scot and lot.

(a) In this case, there was nothing to show that either appellant or respondent was a "person interested" in the appeal. See *Wanklyn*, app., *Woollet*, resp., post, p. 86.

It was proved, (a) that, before and upon the 7th of June, 1832, the right of voting in the election of members of parliament within the said borough, according to the usages and customs thereof, was in the inhabitants paying scot and lot, and that every person who had been duly rated for six calendar months next before an election, and had paid all rates due from him before the actual giving of his vote, was entitled to vote as such scot and lot voter. It was further proved that William Bradley had been upon the register of voters for the said borough every year, as a scot and lot voter, with the exception of the register made in *64] the year 1845, when his name was *expunged, in consequence of his rates due on the 31st of July, 1845, remaining unpaid, and no tender thereof having been made. It was further proved that William Bradley had paid all rates due from him on the 31st of July, 1846, including those which had before been unpaid as aforesaid. And it was also proved that Bradley had always resided within the borough, and had occupied a house, and been rated in respect of it.

It was objected, that the said William Bradley, having been expunged from the register of voters as aforesaid, for the cause aforesaid, for the space of one year, was not entitled to have his name inserted in the register to be made in 1846.

The revising barrister inserted the name of Bradley, subject to the opinion of this court as to the correctness of such insertion.

The cases of ten other persons, four of whose names were inserted in the list of voters for the parish of St. Mary, and four in that of the parish of St. Nicholas, in the borough of Warwick, subject to the same objection, were consolidated with the principal case.

G. Hayes, for the appellant. The question in this case turns upon the construction to be put upon the thirty-third section of the 2 W. 4, c. 45, which enacts "that no person shall be entitled to vote in the election of a member or members to serve in any future parliament for any city or borough, save and except in respect of some right conferred by this act, or as a burgess or freeman, or as a freeman and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or a burgage tenant, as hereinbefore-mentioned: Provided always, that every person now having a right to vote in the election for any city or borough (except those enumerated in schedule A.) in virtue of any other *65] qualification than as a burgess or freeman, or as a freeman *and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as hereinbefore-mentioned, shall retain such right of voting, *so long as he shall be qualified as an elector according to the usages and customs of such city or borough, or any law now in force;* and such person shall be entitled to vote in the

(a) See Pitts, app., *Smedley*, resp., 7 M. & G. 85, 8 Scott, N. R. 907, 1 Lutw. Reg. Cas. 196, where the court remitted the case to the revising barrister for amendment, he having stated evidence only, and not facts.

election of a member or members to serve in any future parliament for such city or borough, if duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified as such elector in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed," &c. In *Jeffrey*, app., *Kitchener*, resp., 7 M. & G. 99, 8 Scott, N. R. 923, 1 Lutw. R. C. 210, it was held that a qualification to vote in a borough election as an inhabitant householder, is not preserved by that section, unless it has been retained continuously from the passing of the act. There, the respondent lost his right by ceasing to be an inhabitant householder in the borough for a period of fourteen weeks. Payment of the scot is as essential a part of the voter's qualification as residence. Taking the 31st of July as the day for testing the claimant's qualification, the barrister finds that this party had not on that day paid or tendered his rates. (a) By the subsequent payment, he would, under the old law, have acquired a new right. But, under the reform act, the break in the continuity of the right destroys it. [MAULE, J. The consequence attaching to the non-payment of rates, is, that the party shall not be registered.] He is not to be registered, because he has ceased to be qualified. The object of the statute was to "enforce a due payment of the rates. [MAULE, J. The penalty [*66 being, not the loss of qualification for ever, but the loss of the right to be on the register for that year. The proviso at the end of sect. 33,—“that every such person shall for ever cease to enjoy such right of voting for any such city or borough as aforesaid, if his name shall have been omitted for two successive years from the register of such voters for such city or borough hereinafter directed to be made, unless he shall have been so omitted in consequence of his having received parochial relief within twelve calendar months next previous to the last day of July in any year, or in consequence of his absence on the naval or military service of His Majesty”—is consistent with non-registration for one year not depriving the party of his qualification.]

Mellor, for the respondent. The decision of the revising barrister was correct, and is consistent with the reading of the act adopted by MAULE, J., in the case cited: "I think the intention of the legislature was, to retain the right of voting to persons who did not part with it by their own voluntary act; but that parties who either ceased to be inhabitants, where that was the qualification, as here, or who allowed their names to be omitted from the register for two [successive] years, should lose their franchise." That case shows that there is a distinction between the condition of registration and the qualification to vote. If

(a) The case does not state this as a fact: it alleges that Bradley's name was expunged from the register "in consequence of his rates due on the 31st of July, 1845, remaining unpaid, and no tender thereof having been made."

not entitled to vote on the 31st of July, the party loses his right to be registered for that year; and that is the whole penalty. The case does not state that the rates had been *demand*ed of Bradley: he was not bound to *tender* them: *Cullen v. Morris*, 2 Stark. N. P. C. 577. [MAULE, J. The receipt of parochial relief for a series of years, though
 *67] it disentitles the party to be on the register, does not destroy his *qualification: but it is insisted that neglect or inability to pay rates once, disqualifies the party for ever!]

Hayes was heard in reply

WILDE, C. J. It certainly would be a very singular consequence, if a person who has been supported by the parish, should, notwithstanding, retain his qualification, and be entitled to be again put upon the register when he ceased to be maintained at the public expense; but that one who neglects or is unable to pay rates for one year, becomes thereby disqualified. I cannot bring myself to entertain any serious doubt upon the construction of this clause of the act. The proviso upon which the question turns, is, "that every person now having a right to vote in the election for any city or borough, in virtue of any other qualification than as a burgess or freeman, or as a freeman and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as hereinbefore mentioned, *shall retain such right of voting so long as he shall be qualified as an elector, according to the usages and customs of such city or borough, or any law now in force*; and such person *shall be entitled to vote* in the election of a member or members to serve in any future parliament for such city or borough, *if duly registered* according to the provisions hereinafter contained." It is not contended that this party would not have been entitled to vote if the election had taken place in that year, provided the rates were paid before the vote was tendered, and this act had not passed. Let us see, then, if the legislature has not taken great care not to destroy a right like this, which would clearly have existed but for the passing of the act. The clause goes on to provide, "that no such person shall be so registered in any year, unless he shall, on the last day of July in
 *68] such year, be qualified as *such elector in such manner as would entitle him then to vote, if such day were the day of election, and this act had not been passed." In order, therefore, to ascertain what the party's right was at that time, we must take it as if the act had not passed. Now, independently of the act, it is not disputed that this party would have been entitled to vote, under the circumstances stated. What, then, is there to deprive him of that right? It does not appear to me that the fact of his having omitted to pay his rates for the year does any more than suspend his right to be on the register for that year. The statute makes a plain and marked distinction between the qualification as a voter and the right to be registered—"no such person *shall be so registered* in any year, *unless he shall*, on the last day

of July in such year, *be qualified as such elector* in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed." And, when we afterwards find that the mere circumstance of a party's being off the register will not deprive him of the franchise, but that he shall only lose his right by having his name omitted for *two successive years*, and not even then if the omission shall be occasioned by his having received parochial relief. I cannot conceive that any greater effect can be given to the act than to hold; that, to operate a permanent deprivation of the right of voting under this section, there must be a destruction or abandonment of that right, according to the usages and customs of the borough, independently of the act. The case of *Jeffrey*, app., *Kitchener*, resp., does not appear to me to have much analogy with the present. All that that case decides is, that one who has lost his right to vote as an inhabitant householder, by abandoning his residence within the borough, does not regain such right by afterwards coming again to reside therein. There, there was a distinct interval of fourteen weeks during which the party had no right to vote at all. *But here, as it seems to me, there is a con- [*69
tinuity of the right; the claimant never having ceased to be an inhabitant paying scot and bearing lot, and not having been off the register for two successive years.

I also think the case fails to show a ground for not inserting the name of the claimant in the register, inasmuch as it does not appear that the rates in respect of which the alleged default was made by Bradley, were ever demanded. (a) *Cullen v. Morris* shows that a personal demand, or a demand in writing left at the rate-payer's place of abode, is necessary, before the party can be disfranchised. Upon both grounds, therefore, and clearly upon the first, I think the decision of the revising barrister must be affirmed.

COLTMAN, J. It seems to me, that, in order to defeat the right of the claimant, there must have been a period when he was excluded according to the usages and customs of the borough. In *Jeffrey*, app., *Kitchener*, resp., the party had ceased to be an inhabitant householder. But here, there is nothing to show that Bradley has done any thing that would have disqualified him from voting, according to the usages and customs of this borough, if the reform act had not been passed. Being an inhabitant householder liable to scot and lot, if he had paid his rates at any time before tendering his vote, he would have been qualified. According to the argument urged on the part of the appellant, non-payment of rates for a day would be a disqualification. The only penalty the act imposes for default is, that the party shall not be entitled

(a) This seems to involve the propriety of the decision of the revising barrister in the preceding year. The default in non-payment *after demand*, if it existed, should have been proved, substantially, without reference to the decision of the revising barrister in the preceding year, even if a demand and refusal had been expressly found by him. Vide ante, p. 65, n. (b).

*70] to be registered, if the *rates are not paid by the 31st of July. He may, however, entitle himself to a vote in the following year.

MAULE, and V. WILLIAMS, JS., concurred.

WILDE, C. J. The court thinks there was not doubt enough in this case to warrant an appeal, and therefore that the respondent is entitled to costs.

Decision affirmed, with costs.

County of HERTFORD.

CHARLES EHRET GROVER, Appellant, (a) JOHN FRANCIS
BONTEMS, Respondent. Nov. 19.

An application by the respondent for leave to deliver paper books after the proper time, does not dispense with the notice required to be served upon him by the 6 & 7 Vict. c. 18, s. 62.

In this case, as in *Norton*, app., *The Town-Clerk of Salisbury*, resp., ante, p. 32, and *Adey*, app., *Hill*, resp., ante, p. 38, the notice to the respondent required by the 6 & 7 Vict. c. 18, s. 62, had not been given, and the respondent now declined to appear. But, inasmuch as the respondent had on a former day applied for and obtained leave to deliver his paper-books to the judges after the proper time,

Welsby, for the appellant, submitted that this, and the fact of the respondent having instructed counsel, was such an appearance as to dispense with notice.

WILDE, C. J. It does not appear to me that the application for
*71] leave to deliver the paper-books, is such *an appearance as to dispense with the performance by the appellant of one of the conditions upon which he is entitled to be heard. He has not been deluded by the respondent, so as to excuse his previous default in not giving the proper notice. We cannot admit of constructive appearance.

The rest of the court concurring.

Appeal dismissed.(b)

(a) There was nothing on the face of this case to entitle Grover to be an appellant, under s. 42, of the 6 & 7 Vict. c. 18. See *Wanklyn*, app., *Woodlett*, resp., post, p. 86

(b) See the next case.

Borough of NEWPORT, Isle of WIGHT.

SAMUEL PRING, Appellant, CHARLES WYATT ESTCOURT,
Respondent. Nov. 6.

An appeal, tendered within the proper time, having been rejected by the officer because the endorsement had not been signed by the revising barrister as required by the 6 & 7 Vict. c. 18, s. 42—The court allowed it to be entered *de bene esse* on the fifth day of the term, due diligence appearing to have been used to obtain the signature within the first four days.

But see *Wanklyn*, app., *Woollett*, resp., post, p. 86.

The decision of the revising barrister took place on the 16th of October. The appellant's attorney was taken ill in the last week of that month, and died on the 7th of November:—*Held*, that this was no excuse for the absence of the notice to the respondent required by s. 62, and that the court had no power, under s. 64, to aid the appellant by postponing the hearing.

In this case, which was a consolidated appeal, the revising barrister had duly signed the *case*, pursuant to the 6 & 7 Vict. c. 18, s. 42, but had omitted to sign the *endorsement* thereon. The case was tendered to the proper officer of this court within the first four days of term, but the officer declined to receive it.

Arnold, on the fifth day of the term, moved that the case might be entered *nunc pro tunc*. The affidavit upon which he moved, showed that every exertion had been made by the appellant's agent, to remedy the defect, as soon as discovered, but without success, the barrister being absent from town. He submitted that *the statute in section 42, [72 was directory only as to the signature of the endorsement; that the master had no more right to refuse to receive and enter the appeal because the endorsement was imperfect, than he would have to object to a defectively or inelegantly stated case; that it would be extremely hard upon an appellant to be deprived of the benefit of his appeal by so mere a slip on the part of the barrister; and that the directions as to the endorsement, in section 42, could hardly apply to consolidated appeals, seeing that the number of appellants might in some cases be so great as to render it impossible to observe them, and the language of section 44, by which, and by section 45, the practice of consolidated appeals is regulated, being somewhat different from that of section 42. [MAULE, J. The same rules and regulations are to apply in both cases; the language of the act in this respect is express. In the case of *Netleton*, app., *Burrell*, resp., 7 M. & G. 35, 8 Scott, N. R. 738, 1 Lutw. Reg. Cas. 157, the court refused to allow an appeal to be entered, the barrister having died, after the case had been agreed to on both sides, but without having affixed his signature to it.] The defect there was much more important than that here. The present case is properly authenticated by the signature of the barrister, the omission is only in a matter purely of form.

WILDE, C. J. The court think, that, as due diligence appears to have been used in this case, on the appellant's behalf, to obtain the bar-

rister's signature to the endorsement, the appeal may be received, on its being now perfected in that respect; but subject, of course, to any objection that may be made on the part of the respondent on the day of hearing.

Appeal received, *de bene esse*. (a)

*73] *The respondent having neglected to deliver paper-books to the two junior judges, pursuant to the practice laid down in *Cooper*, app., *Coates*, resp., 5 M. & G. 98; S. C. *per nom. Allan*, app., *Waterhouse*, resp., 8 Scott, N. R. 68, 1 Lutw. Reg. Cas. 92, the appellant, who had duly delivered his own, prepared and tendered other two copies on the 11th instant, but the judges' clerks refused to receive them without the direction of the court.

Arnold, on the first day appointed for hearing appeals, (Nov. 12,) applied for and obtained permission for the appellant to deliver the additional paper-books.

Upon the case being subsequently called on for argument, it appearing that no notice had been served upon the respondent, pursuant to section 62, of the 6 & 7 Vict. c. 18. (b)

Nov. 19. *Arnold*, for the appellant, moved that the hearing might be postponed, under the proviso in section 64. He relied upon the circumstances of excuse contained in an affidavit of a person calling himself a parliamentary registration agent, who deposed that one Trott, an attorney of this court, who had had the conduct of the appeal on behalf of the appellant, and from whom the deponent received his instructions, was taken seriously ill in the last week of October, and died on the 7th of November. The decision of the revising barrister took place on the 16th of October.

*74] *WILDE, C. J. I do not see how the illness, and subsequent death, of the attorney could at all have interfered with the giving of the notice in this case. Parties must learn to be more prompt. I cannot distinguish this from the cases in which we have already refused to hear the appeals.

The rest of the court concurring,

Appeals dismissed.

(a) But see *Wanklyn*, app., *Woollett*, resp., post, p. 86.

(b) See *Norton*, app., *The Town-Clerk of Salisbury*, resp., ante, p. 32; *Adey*, app., *Hill*, resp., ante, p. 38; and *Grover*, app., *Bontems*, resp., ante, p. 70.

Borough of DARTMOUTH.

JOHN PETHERBRIDGE, Appellant, JOSEPH ASH, Respondent. Nov. 10.

The notice of the appellant's intention to prosecute his appeal, under the 6 & 7 Vict. c. 18, s. 62, must be signed by the appellant himself; the signature of an agent will not suffice. Where an appeal was tendered within the first four days of the term, with a notice imperfectly signed—The court refused to allow the appeal to be entered (the defect being cured) on the fifth day.

THE notice to the master, of the appellant's intention to prosecute this appeal, not having been *signed by the appellant*, as required by the sixty-second section of the 6 & 7 Vict. c. 18,(a) the officer declined to receive it. It was thereupon sent back; and the appellant's signature thereto having been procured, it was again tendered to the officer on the fifth day of the term, but rejected as being too late.

Dowling, Serjt., now moved that the appeal might be entered *nunc pro tunc*. He submitted, that, all reasonable diligence having been used to remedy the defect,—which, after all, was a matter of as little importance as could well be conceived,—the court might, under the *proviso in sect. 64,(b) enlarge the time for receiving the ap- [*75 peal.

WILDE, C. J. The attorney has had the whole time between the decision of the case by the revising barrister and the fourth day of the term, inclusive, to prepare and deliver his notice. He has thought fit to leave it till the last moment, when there is no time left to remedy the defect. The only power we have to extend the time is, under section 64, and that applies to the notice to the respondent, and not to a case like this. I think we cannot properly accede to the application.

The rest of the court concurring,

Dowling took nothing.(c)

(a) Ante, p. 35.

(b) Ante, p. 35.

(c) See *Awey*, app., *Topham*, resp., 5 M. & G. 1, 7 Scott, N. R. 402 1 Lutw. Reg. Cas. 1, and *Simpson*, app., *Wilkinson*, resp., 5 M. & G. 3 (a), 7 Scott, N. R. 406 1 Lutw. Reg. Cas. 5.

*76]

**Hilary Term.*

County of CUMBERLAND.

GEORGE ELLIOT, Appellant, The Overseers of the Parish of ST. MARY WITHIN, CARLISLE, Respondents. Jan. 18.

A parish consisted of four divisions popularly, but improperly, called townships. Four overseers were appointed for the whole parish, one being selected from among the inhabitants of each of the so-called townships. In making out the lists of county voters, the overseer who acted for each division made out a separate list; and each overseer published a separate notice under the 6 & 7 Vict. c. 18, s. 3, sched. (A.), No. 2, requiring persons entitled to vote in respect of property situate within *his township* to send in their claims *to him*. These notices were in each case signed by the particular overseer who acted for that division, and by the assistant overseer, who therein styled themselves "overseers of the township of —."

A notice of claim was directed to, and served upon, the overseer of the particular so-called township in which the qualifying property was situate. This notice being objected to, before the barrister at the revision, he corrected the mistake in the lists, under the power conferred upon him by s. 40, and disallowed the objection:—

Held, that the barrister had properly exercised his discretion, and that the notice was, under the circumstances, sufficient, and well served.

ST. MARY WITHIN, Carlisle, is a parish containing the four divisions following; viz. Abbey Street, Castle Street, Fisher Street, and Scotch Street, which constitute the whole of the parish. These divisions are popularly, but improperly, called townships. They are not townships in the legal sense of the term, as they do not separately maintain their own poor, nor are separate poor-rates made, nor are separate overseers appointed, for any of them; but four overseers—one selected from, and an inhabitant of, each of the so-called townships—are appointed generally for the parish at large, which supports its own poor, and has poor-rates made for it. An assistant overseer is also appointed for the parish at large.

In making out the list of voters for the borough of Carlisle, the four
*77] overseers have always prepared and *published one list for the whole parish. But, in making out the list of voters for the Eastern division of the county of Cumberland, the overseers of the parish have never acted as such, but it has been the custom for each of the four overseers to undertake the exclusive management of such of the so-called townships from which he was so selected as aforesaid, and to hold himself out to the public as the overseers of such so-called township. Consequently, four separate lists of voters for the Eastern division of the county, in respect of property situate within the several so-called townships, each made out separately by a different overseer along with the assistant overseer, have been inserted in the register, instead of one list of voters in respect of property situate within the parish at large.

This year, (1846,) the clerk of the peace, as usual, sent his precepts, &c., under stat. 6 & 7 Vict. c. 18, s. 3, to the overseers of each of the so-called townships; and each of such overseers respectively published, under sect. 4, a separate notice, according to the form No. 2, sched. (A.), requiring persons entitled to vote in respect of property situate within his so-called township, to send in their claims to him and the assistant overseer, who in each case acted with the particular overseer; so that one overseer and the assistant overseer always acted for each of the so-called townships. Each of the above-mentioned notices was signed by two persons only, namely, the particular overseer and the assistant overseer, who, after their signatures, designated themselves as "overseers of the township of," &c. In consequence of these notices, numerous notices of claim were duly served upon the different overseers; but, in every case, the notice of claim was directed to and served upon "the overseer of the township of," &c., according to the requirement of the first-mentioned notice.

A separate list of claimants was prepared by each of *the four overseers (the assistant overseer acting with each of them, as be- [*78 fore) of all the persons who had sent in their claims as aforesaid. Each of such lists was headed "The list of persons claiming to vote, &c., in respect of property situate, &c. within the township of," &c.; and was signed by the particular overseer and the assistant overseer only, who designated themselves as the "overseers of the township of," &c.

The portion of the register in force for the parish of St. Mary Within, sent by the clerk of the peace to the respective overseers as aforesaid, consisted of four separate lists, one for each of the four so-called townships above mentioned, each headed "Township of," &c. Each of these last-mentioned lists, or parts of the register, was signed by the particular overseer and the assistant overseer only, designated, as before mentioned, as overseers of the so-called township. These different lists of voters so made out separately for each of the so-called townships, and each signed by two persons only, as above mentioned, were duly published together, and in immediate juxta-position.

The validity of these last-mentioned lists having been duly objected to, the revising barrister determined that they were invalid, not having been duly signed by a majority of the overseers, as required by the statute 6 & 7 Vict. c. 18, ss. 5, 101; and, consequently, that the register of voters then in force for the parish of St. Mary Within, consisting of the above-mentioned four portions or lists, one for each of the said so-called townships as above mentioned, should be taken to be the list of voters for the said parish for the year then next ensuing, under the 6 & 7 Vict. c. 18, s. 27.

By virtue of the power conferred upon him by sects. 17 and 40 of that act, the revising barrister proceeded to correct the mistakes which were proved to him to have been made in such last-mentioned list of

*79] voters, by *expunging from the heading of each of the above-mentioned four portions of such list the words "Township of," &c., and directing that such four portions should be printed together in one alphabetical list, headed, "The parish of St. Mary Within."

The revising barrister next proceeded, under the powers conferred by sects. 27 and 37 of the above statute, to insert in the said last-mentioned list so amended, the name of every person, who, being omitted from the list of voters, proved to his satisfaction that he gave due notice of his claim to his overseers in manner hereinbefore mentioned, and that he was entitled, on the last day of July, 1846, to be inserted in the list of county voters for the parish of St. Mary Within.

It was proved that Alexander Annandale duly served, in manner hereinbefore mentioned, on the overseers of the so-called township of Scotch Street before mentioned, a notice of claim to be placed on the list of voters for the Eastern division of the county of Cumberland, in respect of property situate within the so-called township; and that such notice of claim was addressed to the said so-called overseers of the township of Scotch Street—the parish of St. Mary Within not being mentioned in such last-mentioned notice.

Under these circumstances, it was duly objected, on the part of the said George Elliot, that the said Alexander Annandale should not be inserted in the said last-mentioned list of voters, inasmuch as his notice of claim was addressed to, and served upon the overseers of the so-called township of Scotch Street, officers who had no existence as such, instead of the overseers of the parish of St. Mary Within.

This objection the revising barrister overruled, because the overseers who acted for the several so-called townships, in manner above mentioned, had all been duly appointed overseers of the parish at large of *80] *St. Mary Within, which includes the whole of the so-called townships, and, by virtue of that appointment, they severally and respectively acted as hereinbefore mentioned, in the different divisions of the said parish so appropriated to each, by their own private agreement, and for their own convenience; and because they severally designated and ostensibly held themselves out to the public as the overseers of such so-called townships, for the purpose of making out the lists of voters for the Eastern division of the county, and thus they deceived the claimants, by assuming a title to which they had no right. Still, as they were the actual and legally appointed overseers of the parish of St. Mary Within, to whom notices of claims to vote in respect of property situate within such parish are, by sect. 7 of the act referred to, required to be given, and as they actually did duly receive the notice of claim of the said Alexander Annandale, the revising barrister held, that the notice of claim of the said Alexander Annandale, and the service thereof, was sufficient, within the meaning of sect. 101 of the act, and inserted in the said amended list of voters for the parish of

St. Mary Within the name of the said Alexander Annandale, who had proved to his satisfaction that he was, on the 31st of last July, entitled to be inserted in the list of voters for the said parish.

If the Court of Common Pleas shall be of opinion that the decision of the revising barrister upon the sufficiency of the above-mentioned notice of claim of the said Alexander Annandale, and the service thereof, is correct, then the name of the said Alexander Annandale is to be retained upon the said last-mentioned list of voters: but, if the said court shall be of a contrary opinion, the name of the said Alexander Annandale is to be expunged therefrom.

The cases of twenty-nine other persons similarly *circum- [81 stanced, and whose names appeared in the same list, were consolidated with the principal case.

Otter, for the appellant. The notice of claim was clearly insufficient: it was directed to "the overseers of the township of Scotch Street," whereas, there are in reality, no such persons and no such place; and the claim was in respect of property alleged to be situate in Scotch Street. [CRESSWELL, J. The party claims to be put upon the list of voters for the Eastern division of the county of Cumberland.] The barrister, finding there was no proper list of voters for the parish of St. Mary Within, falls back upon the register of the preceding year, under the twenty-seventh section of the 6 & 7 Vict. c. 18, (a) and treating this as a mistake, he assumes to amend it under the powers supposed to be conferred on him by s. 40, (b) or by s. 101. (c) This *is not, [82 however, a misnomer or inaccurate description: it is no description at all; and therefore not within s. 101: *Hinton*, app., *Hinton*, resp., 7 M. & G. 163, 8 Scott, N. R. 665, 1 Lutw. Reg. Cas. 259; *Eidsforth*, app., *Farrar*, resp., ante, p. 9. It is no answer to the objection, that the notice in fact reached the hands of the right person. It does not appear how this notice was sent. Suppose it had been put

(a) Which enacts, "that, in case no list of voters shall have been made out for any parish, township, or place in any year, or in case such list shall not have been affixed in any place herein-before mentioned in that behalf, the register of voters for that parish, township, or place, then in force, shall be taken to be the list of voters for that parish, township, or place, for the year then next ensuing, and the provisions herein contained respecting any such list of voters, shall be taken to apply to such register as aforesaid."

(b) Which enacts, "that the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, &c.; and, wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted, or insufficiently described, be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall insert the same in such list," &c.

(c) *Ante*, p. 14.

into the post, directed as it is, who could imagine that it would come to the overseers of St. Mary Within? [CRESSWELL, J. Suppose, contrary to all expectation, it *does* come to the right person? Suppose a writ properly directed to the sheriff of Kent, and by mistake the envelope containing it is addressed and sent to the sheriff of Surrey, and the latter hands it to the former; would that not be a delivery of the writ to the sheriff of Kent?] That would be a case of inaccurate description. But here it is expressly found that the party who received the notice, is commonly known as the overseer of the township of Scotch Street.

Mellor, for the respondent. The fourth section of the 6 & 7 Vict. c. 18, enacts "that the overseers of the poor of every parish and township shall, on or before the 20th of June in every year, publish a notice, according to the form numbered 2, in schedule (A.), having first signed the same, requiring all persons entitled to vote in the election of a knight or knights of the shire to serve in parliament, in respect of any *83] property situate wholly or in part within such parish or *township, who shall not be upon the register of voters then in force, and also all persons so entitled as aforesaid, who, being upon such register, shall not retain the same qualification, or continue in the same place of abode, as described in such register, and who are desirous to have their names inserted in the register about to be made, to give or send to the said overseers, on or before the 20th of July then next ensuing, a notice in writing, by them signed, of their claim to vote as aforesaid; and every such person, and any such person who, being upon such register, may be desirous to make a new claim, shall, on or before the said 20th of July, deliver or send to the said overseers a notice signed by him, of his claim, according to the form of notice set forth in that behalf in the said form numbered 2, or to the like effect." It is not necessary that the form should be precisely followed. The notice here is given to the right person, only it is addressed to him by a wrong description. The party is concluded by the finding of the revising barrister that the service was sufficient: the court will not review his decision upon a matter of fact, even though he refers it to them. [WILDE, C. J. The investigation of matters of fact is certainly not to be thrown upon the court.] This is clearly such a misdescription as the 101st section was intended to cure. In *Eidsforth*, app., *Farrar*, resp., the misdescription was such as to render the identification of the party difficult: here, however, the description in the notice, and the correct description of the party to whom the notice was intended to be addressed, would convey the same meaning to those who were to be affected by, or who were to act upon, the notice.

Otter, in reply. This is not a notice addressed to the right persons *84] by a wrong description. The notice should be addressed to all the overseers, though by *s. 101, service upon any one of them is suf-

ficient. It cannot be said that "the overseers of the township of Scotch street," would be commonly understood to mean "the overseers of the parish of St. Mary Within."

WILDE, C. J. The question in this case referred for our decision, is, whether the notice of claim was so defectively addressed as to disentitle the party to have his claim considered, by reason of its being directed to "the overseers of the township of Scotch street," and not to the overseers of the parish generally, there being no such township in point of law or fact. It is quite clear that this person intended to give a notice according to the requisitions of the act. The inaccuracy arose from the defective notices published by the overseers themselves, in which the particular division of the parish in which the qualifying property is situate, is improperly called a township. The parish consists of four divisions, which are popularly, though, it seems, improperly, called townships. The overseers have thought fit to divide their labours; and one was chosen from amongst the inhabitants of each of these divisions; and each of these overseers was in the habit of making out a separate list of voters for his own division. There was no overseer but such as were *appointed* for the whole parish. Being so appointed for the whole parish, each of the four, by arrangement amongst themselves, takes charge of a particular district or division that is popularly called a township. There could be no overseer who was not overseer of the whole parish: a notice, therefore, to the overseers of a particular township or division, must be taken to be addressed to the overseers of the parish, and the statute is satisfied by a service on one of them. All were overseers of that township. It certainly would be a thing to be much regretted, if the claimant were to be deprived of his vote under the peculiar circumstances of this case. At the same time, we could not sustain a decision [*85 declaring him entitled to be registered, if it appeared that he had failed to perform one of the conditions upon which his right is made to depend. Upon the best consideration I can give to the matter, it appears to me that the notice is virtually a notice to all the overseers of the parish, and is well served; and that this is one of the mistakes and inaccuracies the 101st section was intended to remedy.

With respect to the locality of the qualifying property, it does not appear to me that any objection properly arises in that respect. If the revising barrister had thought that there was not a sufficient description of the property, it would have been his duty to disallow the claim; not having done so, it must be assumed that he decided the description to be sufficient. Confining myself, therefore, to the first point, I think the decision of the revising barrister was right, and must be affirmed.

CRESSWELL, J. (a) I also am of opinion that the decision of the revising barrister should be affirmed. The four overseers, it appears, were appointed for the whole parish of St. Mary Within, though, by arrange-

(a) Maule, J., was absent by reason of illness.

ment, each of the four undertakes the management of a given district. When the claimant in his notice described them as they had already described themselves, he must of necessity be taken to mean the overseers of the parish at large. He has addressed his notice to the overseers, but he has added an erroneous description of them. I think the barrister was warranted in treating the case as falling within section 101.

V. WILLIAMS, J. I also think the decision must be affirmed. The service of the notice is clearly unobjectionable. As to the form of it, I 86*] certainly feel more *difficulty. It should have been directed to the overseers of the parish generally. But, understanding the revising barrister to have held this to be an inaccurate description, within section 101, the persons meant being so denominated as to be commonly understood,—on that ground I agree that his decision should be affirmed.

Decision affirmed.

County of MONMOUTH.

WILLIAM WANKLYN, Appellant, THOMAS WOOLLETT,
Respondent. Jan. 25.

The endorsement of an appeal not having been signed by the revising barrister until the fifth day of Michaelmas term, the court refused to allow the appellant to be heard. *Quære*, whether a mere agent not personally interested in the subject-matter, can be named as appellant to prosecute a consolidated appeal.

JOHN POWELL objected to the name of John Graves being retained in the list of voters for the parish of Llanvihangel-ystern-lewern.

The notice of objection, duly signed and addressed, was delivered to the postmaster of Monmouth on the 24th of August, and a stamped duplicate of such notice was produced before the revising barrister, bearing the Monmouth post-mark of that date. It was proved by the postmaster of Monmouth, that Monmouth is the nearest and only post-town of Llanvihangel-ystern-lewern, which is a small agricultural parish at a distance of about six miles, and that there is no post-office or post delivery there.

When letters are sent to the Monmouth post-office, addressed to persons residing at Llanvihangel-ystern-lewern, it is the practice of the postmaster and the letter-carriers of Monmouth, if such persons are known to them, to leave the letters at the public-houses or other places 87*] *in Monmouth generally frequented by them on market-days or occasional visits. If they are not known to them, the letters are left at the office until some one from the parish calls there for letters. If no one calls in the course of a week, the letters are sent to the dead-letter office.

The notice in question (as appeared by a receipt produced by the postmaster) was delivered by the letter-carrier, on the 25th of August,

to a sister of the voter, who resides in Monmouth. There was no evidence that it ever reached his hands.

On behalf of the said John Graves, it was contended, that, there being in fact no delivery of letters at Llanvihangel-ystern-lewern, the place mentioned in the duplicate of the notice of objection, "in the ordinary course of post," there was no evidence of a delivery to the party intended to be objected to, on or before the 25th of August.

The revising barrister decided, that, under the 100th section of the 6 & 7 Vict. c. 18, the production of the stamped duplicate was to be taken as conclusive evidence of delivery to the said John Graves at Llanvihangel-ystern-lewern; and, there being no evidence offered in support of the claim of the said John Graves, he expunged his name from the list.

The question for the opinion of the court is, whether, there being in fact no delivery of letters, in the ordinary course of post, to the *place* mentioned in the duplicate of the notice of objection, a delivery of a notice of objection, on the 24th of August, to the nearest and only post-town, was a sufficient service of notice under s. 100. If the court shall be of that opinion, the register is to stand without amendment. If they shall be of a contrary opinion, the register is to be amended, by the insertion of the name of the said John Graves (and those of twenty other persons, struck out under the *same circumstances, whose cases were consolidated with the principal case) in the list. [*88
The case was dated the 19th of September, 1846.

Immediately following the statement of the case of John Graves, there was the following declaration of appeal: (a)—"I, on behalf of John Graves, appeal from this decision. Dated, the 19th day of September, 1846. William Wanklyn." And at the end of the note of the revising barrister consolidating the appeals, which was dated the 29th of September, was another declaration, signed, like the above, by William Wanklyn, as follows:—"I, for and on behalf of the said John Graves, and all the other persons who are interested as appellants in this matter, and whose names are written in the first schedule (b) hereunto annexed, do appeal against this decision, and agree to prosecute this appeal."

The declaration by the respondent was as follows:—"I, for and on behalf of all the persons interested as respondents in this matter, and whose names are written in the second schedule (c) hereunto annexed, do agree to appear and answer this appeal. THOMAS WOOLLETT."

Neither the name of Wanklyn, the appellant, nor that of Woollett, the respondent, appeared, by any statement in the case, or in the

(a) See s. 42, post, p. 92.

(b) This schedule contained the names, &c. of the parties objected to.

(c) This schedule contained the names of the objectors to the several persons mentioned in the first schedule.

schedules annexed thereto, to be that of a person interested in the appeals, or any of them.

The endorsement not being signed by the revising barrister, the officer had refused to receive the appeal. That defect having been supplied,

*89] *Keating*, for the appellant, on the sixth day of Michaelmas term, obtained leave to enter the appeal, subject to the objection, as in *Pring*, app., *Estcourt*, resp., ante, p. 70.

Cockburn, for the respondent, objected, that, inasmuch as the preliminary steps required by s. 62 (a) had not been duly taken, viz. the entry of the appeal with the master, with notice of the appellant's intention to prosecute it, the appellant had no right to be heard. The master was perfectly justified in refusing to receive and enter the appeal, the barrister having omitted to sign the endorsement pursuant to s. 42.(b) [CRESSWELL, J. This is a consolidated appeal. Is the endorsement to contain the names of all the parties interested in the appeals?] By s. 45.(c) the like rules and regulations are to apply to consolidated as to other appeals. All the provisions of s. 42 in this respect are by reference incorporated in ss. 44 and 45. An appeal is not the less an appeal under s. 42, because the revising barrister has thought fit to make other cases dependent upon it.

Keating, *contrâ*. The forty-second section contains an express direction for the revising barrister to sign the endorsement. That provision can hardly apply to the case of a consolidated appeal, in which the names of the parties may be, and frequently are, so numerous that it would be utterly impracticable to endorse them all. [WILDE, C. J. In the case of a consolidated appeal, it is not necessary to show by the endorsement who all the parties to the several appeals are. The decision of the court is pronounced in one case only; the others follow as of course. Take the case of a consolidated *rule in an insurance

*90] case: the consolidation rule does not apply to the principal case, but only to those that are consolidated. I see no reason why there should be a difference between a single and a consolidated appeal.] The directions in sect. 44, to the revising barrister to sign the consolidated appeal, are express. If it had been intended that he should in such a case sign the endorsement also, it is reasonable to expect that that would have been expressed with equal particularity. If the argument on the other side be well founded, there was no necessity for the direction in sect. 44, as to the signature of the revising barrister. But for that section, a consolidated appeal could have had no existence at all. [CRESSWELL, J. Would Wanklyn's name, as appellant, satisfy the forty-second section, if this had been the case of a single appeal. WILDE, C. J. The act only authorizes a person *interested in the appeal* to be an appellant. Who is this Wanklyn? and, how comes he to be named

appellant ?] The statute authorizes the revising barrister to name some person as appellant, in a consolidated appeal. He may appoint the overseers or the town-clerk. [CRESSWELL, J. That is, as respondent: but the person appointed as appellant should be one who is interested in the appeal: sect. 44.] That matter is concluded by the act of the revising barrister. The court will assume that he has done his duty. [WILDE, C. J. I do not think we can assume any thing but what appears. An agent may advocate the cause of an appellant: but the appeal is the appeal of the principal.] The respondent is by his own act estopped from relying on this objection; he having entered into a written undertaking to appear and answer the appeal of Wanklyn. If he had objected at the time, the revising barrister would have obviated the difficulty, if difficulty it be, by naming some other person. What is the objection to making the party an appellant, by his *agent? [*91 The language of the forty-fourth section is in the alternative— "*the person so named appellant* in such consolidated appeal, *or some one in his behalf*, shall, at the end of the said statement, make and sign a declaration," &c.

Cockburn, in reply. The appellant clearly has not done that which was necessary to give this court jurisdiction to entertain this appeal: *Autey*, app., *Topham*, resp., 5 M. & G. 1, 7 Scott, N. R. 402, 1 Lutw. Reg. Cas. 1; *Simpson*, app., *Wilkinson*, resp., 5 M. & G. 3 (a), 7 Scott, N. R. 406, 1 Lutw. Reg. Cas. 5.

As to the other point, the view suggested by the lord chief justice is evidently the correct interpretation of the forty-fourth section. The appellant must be a party interested in the appeal. [WILDE, C. J. This manifestly shows the necessity of the provision as to the endorsement. WILLIAMS, J. The forty-second section directs the revising barrister to deliver the statement "with such endorsement thereon, to the *said appellant*," &c.; treating him as a person present.] *Cur. adv. vult.*

WILDE, C. J., now delivered the opinion of the court.

In this case, the court is of opinion that the appeal does not come before it under such circumstances as to bring it within its jurisdiction.

It appeared that John Graves, the voter, lived at such a distance from the nearest post-town as to be out of the regular delivery; that it is the practice of the postmaster and letter-carriers in the district in question, where the parties to whom letters are addressed are known to them, to leave such letters at the public-houses or other places in the post-town generally *frequented by them on market-days or occasional visits, [*92 and, if they are not known, to let the letters remain for a certain time at the office, and then return them, if not called for, to the dead-letter office; and that the letter containing the notice of objection, which was posted under the provisions of the 6 & 7 Vict. c. 18, s. 100, was received from the post-office by a relative of the voter, and did not appear ever to have reached the hands of the party himself.

When the appeal was tendered to the master, pursuant to the sixty-second section of the statute, it had not the endorsement signed by the revising barrister, as required by the forty-second section, to which I will hereafter more particularly refer. Accordingly, on the fifth day of the last term, that defect having in the mean time been supplied, application was made to the court to direct the master then to receive and enter it. To this application the court acceded, without expressing any opinion as to the appellant's right, under these circumstances, to have his appeal heard.

Upon the case being called on in its turn, it was objected by Mr. Cockburn, on the part of the respondent, that the appellant was not entitled to be heard. The objection was founded upon the forty-second section of the statute. The forty-first section gives particular directions as to the conduct to be observed by the revising barrister on the hearing of matters before him. The forty-second section then proceeds to enact "that it shall be lawful for any person who, under the provisions hereinafore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who, in any such case, shall be aggrieved by, or dissatisfied with, any decision of any revising barrister on any point *93] of law material to the result of such case, either himself, or by some person on his behalf, to give to the revising barrister, in court, before the rising of the said court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal, and, in such notice, shall shortly state the decision against which he desires to appeal." It then provides for the statement of a case by the barrister, which he is to read to the appellant in open court, and then and there sign; "and the said appellant, or some one on his behalf, shall, at the end of the said statement, make a declaration, in writing, under his hand, to the following effect; that is to say: 'I appeal from this decision;' and the said barrister shall then endorse upon every such statement the name of the county and polling district, or city and borough, and of the parish or township to which the same shall relate, and also the Christian name and surname and place of abode of the appellant and of the respondent in the matter of the said appeal, *and shall sign and date such endorsement*; and the said barrister shall deliver such statement *with such endorsement thereon*, to the said appellant, to be by him transmitted to her majesty's Court of Common Pleas at Westminster, in the manner hereinafter mentioned," &c. The sixtieth section enacts "that all appeals or matters of appeal from or in respect of any decision of any revising barrister, entertained in *manner hereinbefore mentioned*, shall be prosecuted, heard, and determined in and by her majesty's Court of Common Pleas at Westminster, according to the ordinary rules and practice of that court with respect to special cases, so far as the

same may be applicable and not inconsistent with the provisions of this act, or in such manner and form, and subject to such rules and regulations, as the said court, from time to time, by any rule or order made for regulating the practice and proceedings in such appeals, shall order "and direct." Then comes the sixty-second section, which enacts [*94 "that every appellant who shall attend to prosecute his appeal, shall, within the first four days in the Michaelmas term next after the decision to which such appeal shall relate, transmit to the masters of the said Court of Common Pleas the statement in writing *so signed by the said revising barrister as aforesaid*, and shall also therewith give or send a notice, signed by him, stating therein his intention to prosecute the said appeal; and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his said intention duly to prosecute such appeal, in the said court; and one of the masters of the said court, to be nominated for that purpose by the lord chief justice of the said court, shall forthwith enter every appeal of which he shall have received due notice from the appellant as aforesaid, in a book to be kept by him for that purpose." The question is, whether, no endorsement, signed by the barrister, having been made upon the case at the time it was brought to the master under the provisions of the sixty-second section, the appellant is now entitled to be heard; or, in other words, whether sufficient has been done to give the court jurisdiction to entertain the appeal.

My brother MAULE was not present when the discussion took place: but my brothers CRESSWELL and WILLIAMS and myself are of opinion, that, to make the appeal effectual, and to enable the court to hear it, it is essential that the endorsement should be signed by the barrister. It is to be observed that the whole of the practice on the subject of these appeals depends upon the statute 6 & 7 Vict. c. 18; and it is extremely difficult to say what parts of its provisions are obligatory, and what directory only.

It has been insisted on the part of the appellant that the objection does not properly arise here, inasmuch as this is the case of a consolidated appeal. The only sections that refer to the mode of regulating consolidated appeals are the forty-fourth and forty-fifth, which [*95 do not contain a repetition of the provisions of the forty-second section. The forty-fourth section gives power to the barrister to consolidate cases which depend upon the same point or points of law; and enacts "that the said barrister shall in such case state in writing the case, and his decision thereon, in manner hereinbefore mentioned:" and the forty-fifth section enacts, "that, in and with regard to every such consolidated appeal, the like proceeding shall be had and taken, and the like rules and regulations shall apply, as in the case of any other appeal under this act." That embraces the whole of the directions contained in the forty-second section as to the mode of proceeding in

the case of a single appeal; for, there is no other regulation applicable to consolidated appeals.

The answer that has been attempted to be given on the part of the appellant, is, that the directions relating to single appeals do not apply to consolidated appeals, because they are not repeated in sect. 45. The court, however, does not conceive that to be any sufficient answer; but is of opinion that the general reference in that section to the rules and regulations contained in sect. 42, draws down to, and in effect embodies within it, all the rules and regulations that are required to be observed in the case of single appeals. And, indeed, the observance of such regulations seems to the court to be much more necessary in the case of consolidated appeals than in that of separate and individual appeals. The barrister's signature is nowhere required as an authentication of the parties to the appeal, except as it is required to the endorsement. It is true, that, in practice, it is usual for the barrister to attest by his signature the identification of the appellant in the body of the case: but the statute only requires it in the endorsement. In some of the cases *96] that have come before us, the number of parties whose interests are affected by the decision, and whose appeals are consolidated, has exceeded 100: it is manifestly more essential in such cases that the barrister's signature should authenticate the endorsement of a consolidated appeal, than in the case of a single appellant. The only question is, whether or not the rules and regulations contained in sect. 42 are so brought down and incorporated in sect. 45 as to apply in this respect to consolidated appeals. If they are, unless we find in the latter section something which, in direct language, or by necessary implication, dispenses with them in the particular now under consideration, we must hold them to apply. There is no such language, nor any such necessary implication.

Upon reference to sect. 42, we find, that, in every instance where mention is made of any dealing with the case, the endorsement is carefully mentioned in connection with it: thus, the barrister, having drawn up and signed the case in open court, "shall *then* endorse, &c., and shall sign and date such endorsement;" then, he is to deliver the case, "with such endorsement thereon," to the appellant, for the purpose of its being transmitted to the master; and also to deliver a copy "with such endorsement thereon," to the respondent. It is for the purpose of preventing mistake and undue practice that the barrister is required to do most of the things that are intrusted to his jurisdiction, in open court. The whole language of the section seems to us distinctly to import that the signature of the endorsement by the barrister is to precede the entry of the case; and that, by requiring such endorsement to be dated, the legislature intended to insure its being done at the proper time. Here, the case appears to have been signed by the barrister on the 19th of September; and the endorsement was not signed until after

the expiration of the first four days of Michaelmas term. We therefore think *that the objection that has been taken to our authority to [*97 hear the appeal is well founded.

There is, in reality, no hardship on the appellant in this construction ; for, as he is made the medium of conveyance of the case to the master, it is his own fault if he does not take care that it is, in all respects, in conformity with the act.

Another objection arose in the course of the argument, which did not receive any satisfactory answer. The court does not now profess to give any opinion upon it, but adverts to it for the sake of caution,—that the like objection may for the future be avoided. The forty-second section of the 6 & 7 Vict. c. 18, enacts “that it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by, or dissatisfied with, any decision of any revising barrister on any point of law material to the result of such case, *either by himself or by some person on his behalf*, to give to the revising barrister, in court, before the rising of the said court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal,” &c. : and then, after providing for the mode of stating the case, the clause proceeds :—“and *the said appellant, or, some one on his behalf*, shall, at the end of the said statement, make a declaration in writing *under his hand*, to the following effect, that is to say, ‘I appeal from this decision,’ &c.” The language of this section is somewhat ambiguous. But, under section 44,—as if to show more particularly who is to be considered as the appellant,—it is enacted, “that, if it shall appear to any revising barrister that the *validity of any number of such claims or objections determined by him [*98 at any court as aforesaid, depends, and has been decided by him, upon the same point or points of law, and the parties, or any of them, aggrieved by or dissatisfied with his decision thereon, shall have given notice of an intention to appeal therefrom, it shall in such case be lawful for the said barrister to declare that the appeals against such decision ought to be consolidated, and the said barrister shall in such case state in writing the case, and his decision thereon, in manner hereinbefore mentioned, and that several appeals depend upon the same decision, and ought to be consolidated, and shall read such statement, and sign the same, as hereinbefore mentioned ; (a) and thereupon it shall be lawful for the said barrister to name *any person interested*, and consenting, for and on behalf of *himself* and all other persons *in like manner interested in such appeals*, to be the appellant or respondent respectively in such consolidated appeal, and to prosecute or answer the said appeal,

in like manner as any appellant or respondent might in his own case, under the provisions of this act; and *the person so named appellant* in such consolidated appeal, or *some one on his behalf*, shall, at the end of the said statement, make and sign a declaration in the form or *to the effect* following, that is to say, 'I, for myself and on behalf of all the other persons who are interested as appellants in this matter, and whose names are hereunder written, do appeal against this decision, and agree to prosecute the appeal;' and the person so named respondent in such consolidated appeal, or some one on his behalf, shall, in like manner, make and sign a declaration in writing in the form or *to the effect* following, that is to say, 'I, for myself and on behalf of all the other persons interested as respondents in this *matter, and whose names

*99] are hereunder written, do agree to appear and answer this appeal;' and the name, and, where necessary, the particulars of the qualifications, of every party intended to be joined in such consolidated appeal, shall be written under the aforesaid declaration of the appellant or respondent respectively to which they may respectively refer," &c. So that the barrister, in the case of a consolidated appeal, is only authorized to require this declaration, either as appellant or as respondent, to be made by *a person interested in the appeal*. Now, here, instead of the declaration of the appellant being signed by the appellant himself, it is—"I, on behalf of John Graves, appeal from this decision," not following the language of the statute; and, when he comes to the consolidation, the same party declares, not "I, for myself, &c.," but, "I, for and on behalf of John Graves and all the other persons who are interested as appellants in this matter," &c. And so in like manner the declaration of the respondent varies from the form given in the act: for, it says, "I, for and on behalf of all the persons interested as respondents in this matter, and whose names are written in the second schedule hereunto annexed, do agree to appear and answer this appeal:" and this is signed by a stranger. It may be argued, that the revising barrister has no right to sanction an appeal unless on behalf of a person interested, and that we must assume he has done his duty. Whether, however, this objection is well founded or not—and the court does not profess to give any opinion upon it—the matter is at all events so doubtful as to make it desirable for the future to avoid the difficulty.

Appeal dismissed.

*Borough of BEWDLEY.

[*100

**CHARLES ALLEN, Appellant, EDWARD GREENSILL,
Respondent. Jan. 25.**

A notice of objection, addressed to the voter at A., described as his place of abode in the borough list, was left at his office in B. The office in B. was not the voter's place of abode, and he had no residence in A.

The revising barrister decided that the notice had not been given to or left at the place of abode of the voter as stated in the list, within the meaning of the 6 & 7 Vict. c. 18, s. 17:—

Held, that his decision was correct.

THE name of Edward Greensill was inserted by the overseers in the list of persons entitled to vote in the election of a member for the borough of Bewdley, in respect of property occupied in the hamlet of Lower Mitton, as follows:—

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, Lane, &c. where the Property is situated.
Greensill, Edward.	Lower Mitton.	Office and wharf.	Lichfield Street.

Charles Allen, whose name was in the list of voters for the borough of Bewdley, objected to the name of Greensill being retained in the said list for the hamlet of Lower Mitton.

It appeared that Greensill formerly had a house at Lower Mitton, in which he resided; but that he had left that house for several years; and, at the time of the service of the notice of objection hereafter mentioned, he resided at Hartlebury, in the county of Stafford, which is not within the said hamlet of Lower Mitton. He had never resided at the office and wharf in Lichfield Street. A notice of objection, duly signed by Allen, addressed to "Edward Greensill, Lower Mitton," was left on the 25th of August last at the said office and wharf in Lichfield Street.

Under these circumstances, it was contended on *behalf of Greensill, that the objector had not complied with the provisions of the seventeenth section of the 6 & 7 Vict. c. 18, the notice of objection not having been given to Greensill himself, or left at his place of abode, as stated in the said list. [*101

On behalf of Allen, it was contended, that, as Greensill had not in fact any place of abode at Lower Mitton, as described in the said list, the qualifying property, which was there situate, must be deemed to be his place of abode; and that no other service could in this case have been effected, and therefore such service of the notice was sufficient.

The revising barrister decided that such notice had not been given to,

or left at the place of abode of, Greensill as stated in the said list, within the meaning of sect. 17, and that the objector might in this case have complied with that section by sending a notice by post, addressed to Greensill at his place of abode as stated in the said list, or by serving such notice on him personally: and he accordingly retained the name of Greensill on the said list. And, upon the application of Greensill, the barrister altered the description of his place of abode in the list, to "Hartlebury."

Greensill, on the barrister's deciding that the notice of objection was not duly served, declined going into evidence in support of his qualification.

The question for the opinion of the court, is, whether, under the circumstances above mentioned, the said notice of objection was duly served on Greensill. If the court shall be of opinion that such notice was not duly served, the list is to stand without amendment. But, if the court be of a contrary opinion, the said list is to be amended, by expunging therefrom the name of the respondent—unless the court shall think themselves precluded from so doing, by the circumstance of *102] the *barrister's having decided that the notice was not duly served, and consequently that Greensill was not bound to prove his qualification, which he might perhaps have established, provided the barrister had held that the notice was duly served, and that he was bound to prove his qualification.

W. Alexander, for the appellant. The seventeenth section of the 6 & 7 Vict. c. 18, (a) in express terms directs that the notice of objection shall be given to the voter, or left at his place of abode *as described in the list*. [CRESSWELL, J. The service was neither at the place to which the notice was addressed, nor at the true place of abode.] The main object of the act was, to insure the notice coming to the hands of the party. If this had been sent by post, it would have been delivered as this has been. [CRESSWELL, J. That may be so: but then you would have had a statutable delivery.] There is nothing in the case to show that the office and wharf in Lichfield Street are not in Lower Mitton. [CRESSWELL, J. The case states that Greensill had for many years ceased to reside in Lower Mitton. If, therefore, the office and wharf in Lichfield Street were in Lower Mitton, that is not his place of abode.] That being so, it must be assumed that the qualifying property was his place of abode. [CRESSWELL, J. The list describes an uncertain place in Lower Mitton. Did the overseers mean that the office and wharf in Lichfield Street were in Lower Mitton? If they did, that is the party's place of abode as described in the list.] In *Bishop*, app., *Helps*, resp., 2 Man. Gr. & S. 52, MAULE, J., intimates that sending a notice by the post addressed to the voter's actual place of abode, would not do. [CRESSWELL, J. Suppose we are of opinion, that, in point of

fact, this *notice was left at the place of abode as described in the list—the place the overseers meant to describe as the place of abode; the barrister having found otherwise, we cannot interfere with his conclusion of fact.] It is not a conclusion of fact: it is his opinion upon the construction of the act of parliament. [*103]

Whitmore, for the respondent. The statute gives an objector three modes of serving his notice—personally—at the place of abode as described in the list—or by post, “directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters.”(a) The appellant might here have served the notice personally, or he might have posted it, directed to the voter at “Lower Mitton.” The revising barrister having found that Greensill had for many years ceased to reside at Lower Mitton, and that the notice had not been left at his place of abode as stated in the list, the court are precluded by section 65, (b) from interfering with his conclusion.

Alexander, in reply. The seventeenth section does not *in terms* provide for personal service.(c) The whole statement of this case shows that the barrister intended to reserve to the court a question of law upon the construction of the act. The service here was at the constructive abode of the voter. *Cur. adv. vult.*

*WILDE, C. J., now delivered the opinion of the court.

The question in this case arises upon the service of the notice of objection. It appears that a person named Allen objected to the name of Greensill being retained upon the list of voters for the borough of Bewdley. This notice of objection was left at an office in Lichfield Street, which the case distinctly states *not* to be the residence of the claimant. Now, the act of Victoria requires the notice to be served personally or at the place of abode of the party, as stated in the list, (d) or by transmitting it through the post, as provided for by sect. 100. The validity of this notice, therefore, depends upon its service at Greensill's residence. On the part of the appellant, it was insisted, that, though the place at which the alleged service took place was not in fact the voter's place of abode, it must for this purpose be so considered. Greensill's place of abode is described in the list of voters to be “Lower Mitton.” It appears from the case, that, though his residence once was at Lower Mitton, it had ceased to be so for several years. The statement on the list that Lower Mitton was his place of abode, was the mistake of the overseers. It was contended, that, as Greensill had no place of abode in Lower Mitton, the qualifying property, which was

(a) Section 100.

(b) Which enacts, “that no appeal or notice of appeal under this act shall be received or allowed against any decision of any revising barrister upon any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only.”

(c) Vide ante, p. 11, n. (a).

(d) Ante, p. 11.

there situate, must be deemed to be his place of abode, and therefore that a service there was sufficient. But the case expressly finds that Greensill had never resided at the office in Lichfield Street. The question therefore is, whether, if the overseers state in the list a place of abode which is incorrect, the rights of the voter are to be affected by a blunder which it is no part of his duty to correct, and in a matter over *105] which he has no control. When the statute prescribes the *duty of the objector in the service of the notice, it gives him the choice of three modes. If he chooses to select service at the place of abode as described in the list, he must take the risk of its turning out not to be the true place of abode. He may always guard himself against mistakes by a personal service, or by sending the notice by post. In this case, therefore, as the revising barrister has found distinctly that the office in Lichfield Street is not the place of abode of Greensill, and that he has no residence in Lower Mitton, we think the decision was correct in point of law, and must be affirmed. Decision affirmed.

Borough of BRECON.

AYTHAN POWELL, Appellant, LEMUEL PRICE, Respondent.

Jan. 25.

A. occupied a shop, which, together with a house and other premises, also occupied by him, constituted a sufficient qualification in point of value, but neither being sufficient alone. The shop was separated from the rest of the premises by a yard, in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him:—*Held*, that the shop could not be joined with the other premises, so as to constitute one entire qualification, under the statute 2 W. 4, c. 45, s. 27.

LEMUEL PRICE objected to the name of Aythan Powell being retained on the list of voters for the borough of Brecon, on the ground that a shop, of which Powell was owner and occupier, could not be joined with a house, bakehouse, and garden, of which he was also the owner and occupier, so as to constitute one entire qualification, within the meaning of the statute 2 W. 4, c. 45, s. 27; neither the last-mentioned premises *106] *without the shop, nor the shop without the last-mentioned premises, being of the clear yearly value of 10*l.*, but the said last-mentioned premises and shop together being of that value.

The shop in question fronts a street called Mill Street; the house, bakehouse, and garden in question, are at the back of the shop, and are separated from it, by a yard, in manner after mentioned.

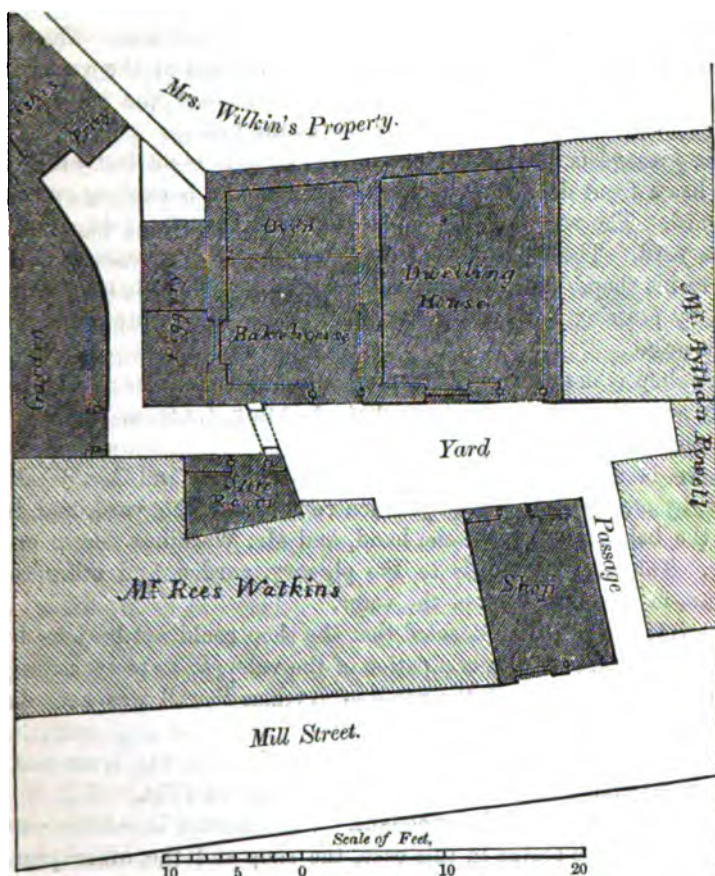
The accompanying plan was annexed to, and to be considered part of, the case.

The voter is a baker; the shop and bakehouse are used by him in his business, and the house is his dwelling-house.

*PLAN OF THE PREMISES.

[*107

The parts dark-tinted are the premises in the occupation of the appellant.



On its right, the shop is contiguous to a house, also fronting the street: this house is in the occupation of a Mr. Watkins, and is not the property of the voter. On its left, the shop is separated by a passage from the next house to it fronting the street on that side. The last-mentioned house is the property of the voter, but in the occupation of his tenant. At the farthest end of the passage from the street, and contiguous to, and at right angles with the last-mentioned house, is another house also the property of the voter, but in the occupation of another tenant of the voter. This house is contiguous to, and in the same line with, the house and bakehouse, which constitute part of the voter's alleged qualification. Nearly at the farthest end of this passage

from the street, to the left hand on passing from the street, and at right angles with the passage, is the yard before mentioned.

This yard lies between the fronts of the voter's house and bakehouse on the one hand, and the backs of the voter's shop and Mr. Watkins's house on the other.

The passage and the yard are the property of the voter. The voter's tenant, who occupies the house contiguous to that of the voter, is the
 *108] only person who *has a right of way along the passage; and the voter has the exclusive use of the yard.

The passage is five feet wide, and the yard is eight feet wide. The shop has a front door opening to the street, and a back door opening to the yard. The voter's house and bakehouse have front doors opening to the yard. The front door of the voter's house is opposite to the back door of his shop. The voter passes from his house and bakehouse to his shop, by crossing the yard, and without going either into the street or the passage.

The shop is not contiguous to the house and bakehouse; nor is it connected with them by any intermediate building, fence, or other matter than the soil of the said yard.

There is a connection between the bakehouse and Mr. Watkins's house, by means of a door-way which runs across the yard, and is let into the bakehouse on the one hand, and Mr. Watkins's house on the other. This door-way leads to the piggery, garden, and other conveniences, in the occupation of the voter.

The revising barrister decided that the shop could not be joined with the other premises in the occupation of the voter, so as to constitute one entire qualification: and the name of Aythan Powell was accordingly expunged from the said list of voters.

If the court is of opinion that the above decision was erroneous, the name of Aythan Powell is to be restored to the said list.

Kinglake, Serjt., for the appellant. The question is, whether, under the circumstances stated in this case, the shop and the other premises occupied by Powell can be joined together so as to constitute one entire
 *109] qualification, within the 2 W. 4, c. 45, s. 27. The case of **Dewhurst*, app., *Fielden*, resp., 7 M. & G. 182, 8 Scott, N. R. 1018, 1 Lutw. Reg. Cas. 274, having decided that two distinct buildings cannot be joined together in order to constitute a borough qualification under that section, it becomes important on the present occasion to see whether, calling in aid the doctrine of curtilage, the whole of these premises may not be considered as part of the dwelling-house. In *Russell on Crimes*, 8d edit. vol. i. p. 798, it is said, that "The mansion or dwelling-house in which burglary might be committed, was held formerly to include the outhouses, such as warehouses, barns, stables, cow-houses, or dairyhouses, though not under the same roof, or joining contiguous to the dwelling-house, provided they were *parcel* there-

of. (a) And any outhouse within the *curtilage*, or same common fence, as the mansion itself, was considered to be parcel of the mansion, upon the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or homestall." (b) The law as to burglary has, in this respect, been altered by the 7 & 8 G. 4, c. 29, s. 18, which enacts, "that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other." The common law doctrine, however, will still govern the construction of the 2 W. 4, c. 45, s. 27. In *Rex v. Hancock*, R. & R. C. C. 170, it was held, that a building within the same fence as the dwelling-house, *and used with it as parcel [*110 of the dwelling-house, though it has no internal communication with the house, but through an open passage, is parcel of the dwelling-house; and it is equally so, though used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he has a partner. So, in *Rex v. Chalking*, R. & R. C. C. 334, the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined: all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., so as to be altogether an enclosed yard: the workshop had no internal communication with the house, and it had a door opening into the street: its roof was higher than that of the dwelling-house. The street-door of the workshop was broken open in the night; and, upon an indictment for burglary, and conviction, the judges held that the workshop was parcel of the dwelling-house, and the conviction right. In *Rex v. Clayburn*, R. & R. C. C. 360, the prisoner broke into a goose-house, opening into the prosecutor's yard, into which his house also opened; the yard was surrounded partly by other buildings of the homestead, and partly by a wall: some of the buildings had doors opening backwards; and there was a gate in one part of the wall, opening upon a road: the goose-house was held to be part of the dwelling-house. In *Rex v. Westwood*, R. & R. C. C. 495, it was held, that a building separated from the dwelling-house by a public road, however narrow, will not be parcel of the dwelling-house, if there is no common fence or roof to connect them, though it be held by the same tenure, and though some of the offices necessary to the dwelling-house adjoin it, and though there be an *awning extending from it to the dwelling-house. That was the case of a public footway or passage. In *Rex v. Walters*, Moody, [*111

(a) 3 Inst. 64, 1 Hale, 558, Sum. 82, 1 Hawk. P. C. c. 38, s. 21, 4 Bl. Comm. 225.

(b) 1 Hale, 558, 559, 1 Hawk. P. C. c. 38, s. 25, 4 Bl. Comm. 225, 2 East, P. C. c. 15, s. 10, p. 493.

C. C. 18, it was held, that an outhouse in the yard of a dwelling-house, will be parcel of the dwelling-house, if the yard is enclosed, though the occupier has another dwelling-house opening into the yard, and he lets such dwelling-house with certain easements in the yard. The yard here, which is in the exclusive occupation of Powell, is clearly within the curtilage, according to these cases. The only possible doubt arises from the want of a gate or fence at the end of the five-foot passage: that, however, can hardly be enough to destroy the general character of the tenure. A stringent application of the doctrine will have the effect of multiplying questions as to occupations of this sort.

Peacock, for the respondent. None of the cases cited have any bearing upon this. In all of them, the building as to which the offence was charged, was within the curtilage or boundary fence; there was an entire and perfect enclosure. Here, however, the yard is open to the public street. In 4 Blackstone's Commentaries, p. 224, speaking of burglary, it is said: "It must be, according to Sir Edward Coke's definition, in a mansion-house; and, therefore, to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes, that it is *domus mansionalis Dei*.(a) But it does not seem absolutely necessary that it should in all cases be a mansion-house; for, it may also be committed by breaking the gates or walls of a town in the night;(b) though that, perhaps, Sir Edward Coke would have called 112*] the mansion-house of the garrison or *corporation. Spelman

defines burglary to be '*nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetranda*.' And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling-house; for, no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence." [WILDE, C. J. Your argument would seem to exclude the stables, in estimating the value of an inn for this purpose; for, inn-yards are frequently without gates.] *Dewhurst*, app., *Fielden*, resp., is a distinct authority to show that buildings situate like these, cannot be joined for the purpose of making up a qualification. [WILDE, C. J. The two tenements there, were three hundred yards apart, with premises belonging to third persons intervening.] The whole must be within the curtilage. [WILDE, C. J. Would this shop pass by a conveyance or a devise of "the house I now occupy, with the appurtenances?"] A shop, a thing corporeal, cannot be appurtenant to a house. In *Doe d. Parkin v. Parkin*, 5 Taunt. 321, the testator devised "all his messuages in T., and then in his own occupation, with the appurtenances:" he had two messuages in T., of which he occupied only one; and it was held that only that one passed by the

(a) 3 Inst. 64.

(b) Spelm. Gloss. tit. *Burglary*; 1 Hawk. P. C. 103.

devise. Here, the shop was capable of being held quite distinct from the rest of the premises. It is like a man occupying a dwelling-house on one side of a street, and a shop on the other side. [WILDE, C. J. Would it have made any difference, if the passage had been covered?] According to *Rex v. Westwood*, it would not. [WILDE, C. J., referred to *Hinchliffe v. The Earl of *Kinnoul*, 6 Scott, 650, where [*118 a good deal of discussion took place as to what will pass under the word "appurtenances."](a)

Kinglake, Serjt., in reply. *Taylor v. Clemson*, 2 Q. B. 978, is an authority to show that under the word "house" will pass all within the curtilage that in common understanding belongs to and is occupied with the house. Here, the principal subject-matter of occupation is the house: a building used with it by the occupier for the purpose of his trade must necessarily pass by the term house. The whole would be rated together under the description of the party's dwelling-house.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

The appellant in this case claimed to be entitled to be registered in respect of the occupation of premises of the yearly value of 10*l.*, which are described in the case as a house, shop, bakehouse, and garden; the shop being detached from the rest of the premises in the manner described in the case, and in the plan thereto annexed: and the question argued before us was, whether that shop, which was essential to constitute the value necessary to confer a vote, could be joined with the rest of the premises, and considered as a part of the house. Now, the twenty-seventh section of the 2 W. 4, c. 45, which gives the right of voting in respect of occupation of a house, does not define the term, but leaves it to be determined by general principles of law. That section provides "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not *subject to any legal incapacity, [*114 who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote," &c. The question is, whether this shop is part of the house within the meaning of that section. Now, it may be considered as quite clear that "by the grant of a messuage or house, *messuagium*, the orchard, garden, and curtilage do pass."(b) But no instance can be shown in the books, where, under

(a) See *Doe d. Clements v. Collins*, 2 T. R. 498.

(b) Co. Litt. 5 b; and see Co. Litt. 56 b.

the word "house," a shop situated as this is has been held to pass. It could not pass by reason of its being within the curtilage; for, there is no common curtilage, so as to make any of the burglary cases applicable. If, then, this shop cannot, either within any of the civil or criminal cases, be included within and considered as part of the house, I see no reason why we should give a larger signification to the word in this act. If the occupation of two adjoining houses would not constitute a qualification, why should premises situate like these? It will be observed that there is nothing to separate the appellant's yard from Mill Street. Inasmuch, therefore, as this shop would not pass by a conveyance of the house, with its appurtenances, and could not for any purpose be considered as part of the *domus mansionalis* of the party, we think it cannot be joined with it for the purpose of making up a qualification, and therefore that the decision of the revising barrister, holding the objection to the vote good, must be affirmed.

Decision affirmed.

**Miliary Variation.*

[*115]

THOMAS WOOLLETT, on Behalf of **JOHN LLWELLYN** and Eighty-three Others, (a) Appellant, **HENRY JOHN DAVIS**, Respondent. *Feb. 1.*

In a notice of objection, the place of abode of the objector was described as "The Oaks" (without the addition of any parish, township, or other district,) "on the register of voters for the parish of St. W." In the list of voters for the parish of St. W., the objector's place of abode was described as St. W., and his qualifying property as "The Oaks:—"

Held, that the description was insufficient, and could not be aided by a reference to the list of voters, so as to show that the place called "The Oaks," was in the parish of St. W.; and that the objection was not removed by the finding of the revising barrister that the place referred to was in fact in the parish of St. W.

JAMES BIRCH objected to the name of John Llewellyn being retained in the list of voters for the parish of Peterstone, in the county of Monmouth. The notice of objection sent to Llewellyn by Birch, was as follows:—

"I hereby give you notice, that I object to your name being retained in the Peterstone list of voters for the county of Monmouth. Dated, this 22d day of August, 1846. (Signed) "JAMES BIRCH,

"Of 'The Oaks' on the register of voters for the parish of St. Woollos."

A notice, similarly signed, was sent by Birch to the overseers of the parish of Peterstone. In the list of voters for the parish of St. Woollos, the description of Birch was as follows;—

Christian Name and Surname, &c.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like Place in this Parish, &c.
Birch, James.	St. Woollos.	House and Land as Occupier.	The Oaks.

*It was objected, on the part of the voter, that the place of abode of Birch, described in the register, as St. Woollos, was not set forth in the notice of objection, in manner and form required by law, inasmuch as it did not appear by necessary implication, that "The Oaks," mentioned in the notice of objection as his place of abode, was in the parish of St. Woollos, or where it was situate. [*116]

The revising barrister decided that the notice of objection was sufficient; and, no evidence having been offered in support of the vote of Llewellyn, he expunged his name from the list of voters.

(a) See *Wanklyn*, app., *Woollatt*, resp., ante, p. 86.

The place of abode of the objector was proved to be "The Oaks," in the parish of St. Woollos.

The question for the opinion of the court is, whether, coupling together the notice of objection and the list of voters for the parish of St. Woollos, it did not sufficiently appear that the place called "The Oaks," (stated in the list of voters to be the *house occupied* by Birch,) was his place of abode, and that it was situate in the parish of St. Woollos. If the court are of opinion that the notice was sufficient, the register is to stand without correction; if they are of a contrary opinion, the name of John Llewellyn is to be inserted in the list of voters for the parish of Peterstone.

The cases of eighty-three other persons, objected to by the same individual upon similar notices, were consolidated with the principal case.

Cockburn, for the appellant. The objector has failed to comply with the directions of the act. By the seventh section of the 6 & 7 Vict. c. 18, the notice given to the person objected to is to be according to the form numbered 5 in the schedule (A.), or to the like effect; and that form requires the signature of the objector, with his place of abode, and a statement that he is on the register of voters for a particular parish.

*117] What is meant by "place of abode?" Is it *enough for the objector to describe himself, as here, of the name of the house he resides in, without any local or territorial description? The statement of the objector's place of abode is required for the purpose of identification. Is the statement here sufficient for that purpose? In order to identify the party, he should state the parish in which he resides, or the township: *Gadsby* app., *Warburton*, resp., 7 M. & G. 11, 8 Scott, N. R. 775, 1 Lutw. Reg. Cas. 136. He is bound to state with accuracy his place of abode, and that he is on a list of voters for the county. It is essential that the objector's place of abode should appear without ambiguity; for, if the objection is frivolous, the revising barrister may visit him with costs.

Keating, for the respondent. The cases of *Knowles*, app., *Brooking*, resp., 2 Man. Gr. & S. 226, 1 Lutw. Reg. Cas. 461, and *Wills*, app., *Ady*, resp., 2 Man. Gr. & S. 246, show that the place of abode of the objector, as stated in the notice, need not be the same as that annexed to his name in the list. [MAULE, J. Each case must depend upon its own circumstances.—Would "The Oaks, Cheltenham," be sufficient, the parish of Cheltenham containing about 80,000 inhabitants? WILDE, C. J. Or, St. Pancras, which is about twenty-one miles in circumference?] It is clear that the parish need not be mentioned: *Gadsby* app., *Warburton*, resp., decides that. [CRESSWELL, J. There the township was stated.] The revising barrister has found that the notice was sufficient, that the party was not misled by it, and that "The Oaks" was in fact in the parish of St. Woollos. [WILDE, C. J. The case is imperfectly

stated in this respect. The real question is, whether the place of abode of the objector is so described as to be commonly understood to mean "The Oaks, in the parish of St. Woollos." The court will *not assume inconvenience and uncertainty, where none is found. [*118 [WILDE, C. J. The mode of stating the question for the court induces me to doubt whether the revising barrister meant to decide that the description was sufficient. MAULE, J. He seems to have assumed the opinion of the minority, in the case of *Knowles*, app., *Brooking*, resp., to have been correct. Consistently with the *decision* of that case, I think the notice cannot be expanded as the revising barrister has done here. It might be sufficient for an objector to describe himself as of "No. 333, Strand, London." But "Manchester," "Rose Villa," "The Oaks," and such like, I think would not do. The statute requires a sufficient address, to enable the party to be found and identified.] *Knowles*, app., *Brooking*, resp., decides, at all events, that the place of abode is required for the purpose of information, and not identification with the register. *Hinton*, app., *Hinton*, resp., 7 M. & G. 163, 8 Scott, N. R. 995, 1 Lutw. Reg. Cas. 529, is quite as strong a case as the present. There the name of the objector in the notice differed from that which appeared on the list; and the barrister having held the notice to be sufficient, TINDAL, C. J., said: "As far as we can infer from the fact of the revising barrister having held the notice sufficient, he must have thought that the name could be commonly understood." Assuming, then, that this is a question of fact, the court cannot arrive at any satisfactory conclusion as the case at present stands.

Cockburn, in reply. Upon the facts as stated, the decision of the revising barrister clearly cannot be upheld. It is quite clear he did not decide upon the supposed notoriety of the objector's place of abode: the conclusion he came to was induced by coupling the description in the notice with that which appears in the list of voters. That was wholly unwarranted. *Cur. adv. vult.*

*WILDE, C. J., now delivered the judgment of the court. This [*119 is a consolidated appeal, by Thomas Woollett, against the decision of the revising barrister for the county of Monmouth, under the authority of which several names were struck out of the list of voters. The question presented for the opinion of the court by the revising barrister, although not very accurately stated, in substance depends upon the construction of the stat. 6 & 7 Vict. c. 18, s. 7. By that section, every person objecting to the name of any other person being retained in any list of voters for a county, is required to give notice to the person objected to, according to the form No. 5, in schedule (A.), "or to the like effect." The form referred to denotes that the notice is to contain a statement of the place of abode of the objector, and also of the name of the parish in which the objector is registered as a voter. By this enactment, the legislature plainly intended that the notice to be given should

therein set forth all the requisite particulars to inform the party to whom the notice was to be given, of the place of abode of the objector. The names of both the objector and the person objected to, connected with this appeal, were contained in the list of voters for the county of Monmouth; and it should be observed, that voters for counties, in respect of property qualifications, are not, like voters for boroughs, restricted as to the place of their residence. Such voters are registered in the parish where the qualifying property is locally situated, without regard to whether the voters do or do not reside in that parish. The notice in the present case stated the place of abode of the objector to be at "The Oaks," without any more particular description; but added, that the objector was on the register of voters for the parish of St. Woollos. The latter statement, as before observed, imported only that *120] the property qualification of the objector was locally situated *within the parish of St. Woollos, and not that he resided in that parish.

The case states that the person objected to attended before the revising barrister, and declined to prove his qualification, upon the ground that the objector had not complied with the statute, by stating his place of abode in the notice served by him, the statement in the notice being too general to be available as a statement of his place of abode. It appears from the case, that it was conceded before the barrister, that the statement of the place of abode contained in the notice was of itself insufficient; but it was contended, that, as the notice also stated that the objector was registered in the parish of St. Woollos, the party receiving the notice might, by resorting to the register, have learned that "The Oaks" was in the parish of St. Woollos, and therefore that the notice was sufficient. The barrister adopted this view of the case, and held that the notice, although insufficient in itself, yet might be aided by being coupled with the register; and that, as the two documents so coupled together furnished the means of ascertaining that the objector's place of abode was at "The Oaks, in the parish of St. Woollos," therefore the notice was good, and sufficiently conformed to the statute.

We are of opinion that this decision was wrong, and that no notice can be deemed to be in the form or to the effect required by the statute, which does not in itself contain a sufficient statement of the place of abode. We think that it is contrary to the meaning and intent of the legislature, that the party receiving the notice should be compelled to take trouble, and to resort to other sources than the notice itself,(a) in order to obtain the necessary information as to such place of abode. The appeal, therefore, must be allowed. Decision reversed.

(a) If he were, no place of abode need appear in the notice, as it would be supplied by the register.

CASES

DETERMINED IN THE

COURT OF COMMON PLEAS,

IN

Milary Variation,

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

BOYSON and Another v. GIBSON and Others. *Feb. 15.*

The 31st section of the 3 & 4 W. 4, c. 55, enacts that the sale of a registered ship shall be by an instrument in writing, containing a recital of the certificate of registry, "otherwise such transfer shall not be valid or effectual for any purpose whatsoever, either in law or equity." The 34th section provides that no instrument shall be valid to pass the property in a ship, *or for any other purpose*, until such bill of sale shall have been registered by the proper officer. And by s. 35, it is enacted, that, when and so soon as the instrument shall have been registered, it shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure an endorsement on the certificate of registry, in the manner thereafter mentioned.

A British ship registered under this act was conveyed by A., the registered owner, to B, for a valuable consideration, by a bill of sale executed before, but not registered until after, the bankruptcy of A.:—*Held*, that B. thereby acquired no property in the ship, but that it passed to A.'s assignees—the effect of the statute being, that, until registration, every disposition by the act of the vendor, or of the law, is as effectual as if the unregistered deed had not existed, and is not defeated by subsequent registration, whether such intermediate disposition be one which requires registration, and is registered, or one which does not require registration.

TROVER, for a schooner called The Eliza Jane of Cardiff. Pleas, not guilty, and not possessed.

*The following case was, by consent, and by order of COLT- [*122
MAN, J., stated for the opinion of the court:—

The plaintiffs are merchants in London. The defendants are the assignees of William Jones, a bankrupt, who before and at the time of his bankruptcy was a timber-dealer at Cardiff. In December, 1842, the bankrupt was indebted to the plaintiffs in the sum of 400*l*. As a security for the said debt, on the 21st of January, 1843, the bankrupt *bond fide* executed to the plaintiffs an indenture of mortgage, (prepared by themselves, and by them forwarded to him for signature,) of the schooner in question, of which the following is a copy:—

"This indenture, made the 21st of January, 1843, between W. Jones,

of Cardiff, in the county of Glamorgan, &c., of the one part, and A. Boyson and J. Hoyer, of, &c., merchants, (the plaintiffs,) of the other part—witnesseth, that, for and in consideration of the sum of 400*l.* to the said W. Jones in hand paid by the said A. Boyson and J. Hoyer at or before the ensembling and delivery of these presents, the receipt whereof the said W. Jones doth hereby acknowledge, he the said W. Jones doth grant, bargain, sell, assign, transfer, and set over unto the said A. Boyson and J. Hoyer, their executors, &c., all that ship or vessel, called the *Eliza Jane*, whereof is master —, and now lying or being in the port of Cardiff, and herein particularly mentioned and described; together with all and singular the masts, sails, yards, anchors, cables, ropes, cords, guns, gunpowder, ammunition, small arms, tackle, apparel, boats, oars, and appurtenances whatsoever, to the said ship or vessel belonging or in any wise appertaining; which said ship or vessel has been duly registered, pursuant to act of parliament; and a copy of the certificate of such registry is as follows:—

*. Certificate of British Registry.

*123] Nov. 5, 1842, } This is to certify, that, in pursuance of an act passed
 'Cardiff. } in the fourth year of the reign of King William the Fourth,
 intitled *An act for the registering of British vessels*, W. Jones, of Cardiff, in the county of Glamorgan, timber-merchant, having made and subscribed the declaration required by the said act, and having declared that he is sole owner (in the proportion specified on the back hereof) of the ship or vessel called the *Eliza Jane*, of Cardiff, which is of the burden of 70 $\frac{333}{310}$ tons, and whereof David Williams is master; and that the said ship or vessel was built at Cardiff, in the county of Glamorgan, in the year 1842, as appears by the certificate of W. Jones, the builder, dated 10th February, 1842; and Thomas Thomas, surveyor, having certified to us that the said ship or vessel has one deck and two masts, that the length from the inner part of the main stem to the fore part of the stern-post aloft, is, 56 feet, 2 tenths—the breadth in midships is 16 feet, 3 tenths—her depth in hold in midships is 10 feet, 2 tenths—that she is schooner rigged, with a standing bowsprit—is square-sterned, carvel built—has no galleries—and a female figure-head; and the subscribing owner having consented and agreed to the above description, and having caused sufficient security to be given, as is required by the said act;—the said ship or vessel called the *Eliza Jane* has been duly registered at the port of Cardiff. Certified, under our hands, at the Custom-House in the said port of Cardiff, this 28th of February, 1842.

'H. SLADEN, Comptroller.'

(Signed) 'R. DAW, Collector.

'Admeasurement, under the act 5 & 6 W. 4.

'Tonnage, P. 5, S. 4, W. 4, 83 $\frac{33}{100}$ tons.

'No. 264. Certificate of British Registry.'

*Endorsed.

[*124

Names of the several Owners within mentioned.	Number of Sixty-fourth Shares held by each Owner.
'William Jones.'	Sixty-four. (Signed,) 'R. Daw, Collector. 'H. Sladen, Comptroller.

"To have and to hold the said sixty-four full, equal, and undivided sixty-fourth parts or shares of the said ship or vessel and premises hereby assigned, or intended so to be, from and by the said William Jones to the said A. Boyson and J. Hoyer, their executors, &c., to and for their own use and benefit; subject, nevertheless, to the proviso for redemption hereinafter contained (that is to say)—Provided always, and it is hereby declared and agreed, by and between the said parties to these presents, that, if the said William Jones, his executors, &c., do and shall well and truly pay or cause to be paid unto the said A. Boyson and J. Hoyer, their executors, &c., the full sum of 400*l.*, together with interest for the same in the mean time, at and after the rate of 5*l.* *per cent. per annum*, on the 12th of March, 1843, then these presents, and every thing herein contained, shall be and become utterly void: Provided also, and it is hereby further agreed, that, if the said sum of 400*l.*, or the interest thereof, or any part thereof, shall not be paid on the day or time hereinbefore appointed for payment of the same respectively, it shall and may be lawful to and for the said A. Boyson and J. Hoyer, their executors, &c., without any further or other authority from or by the said W. Jones, his executors, &c., to sell, assign, or dispose of the said vessel or ship and premises hereby assigned, by public auction or private contract, to any person or persons whomsoever, for such price or sum of money as the said A. Boyson and J. Hoyer, their executors, &c., shall think proper; and also *that the receipts in writing of the said A. Boyson and J. Hoyer, their executors, &c., for any sum or sums of money payable to him or them under the power of sale hereinbefore declared, shall be sufficient and effectual discharges for the same respectively; and that the person or persons to whom the same shall be given shall not afterwards be answerable or accountable for any loss, misapplication, or non-application, or be obliged to see to the application of the money therein acknowledged to be received: and it is hereby agreed between the said parties, that the said A. Boyson and J. Hoyer, their executors, &c., shall stand possessed of the money to arise from such sale as aforesaid, upon trust, in the first place, to pay and satisfy the costs, charges, and expenses which he or they shall be put into in the exercise of the power of sale hereby created; and, in the next place, to retain, pay, and satisfy unto the said A. Boyson, and J. Hoyer, their executors, &c., the said sum of 400*l.*, and interest for the same, or so much thereof as shall then remain due

and owing; and in trust to pay the surplus, if any, unto the said W. Jones, his executors, &c.: and the said W. Jones doth hereby, for himself, his heirs, &c., covenant, promise, and agree, to and with the said A. Boyson and J. Hoyer, their executors, &c., that the said W. Jones, his executors, &c., shall and will well and truly pay or cause to be paid unto the said A. Boyson and J. Hoyer, their executors, &c., the said sum of 400*l*., with interest for the same, after the rate aforesaid, at or on the day or time hereinbefore expressed and appointed for payment of the same; and also that the said W. Jones, at the time of the sealing and delivery of these presents, is the true and lawful owner and proprietor of the said vessel or ship and premises hereby assigned, or intended so to be, and now hath good right, full power, and lawful and absolute authority to grant, bargain, sell and assign the same unto the said A. Boyson and J. Hoyer, their executors, &c., in manner and form aforesaid, according to the true intent and meaning of these presents; and that it shall and may be lawful to and for the said A. Boyson and J. Hoyer, their executors, &c., from and after default shall be made in payment of the 400*l*. and interest, or any part thereof, as aforesaid, peaceably and quietly to have, hold, possess, and enjoy the said vessel or ship and premises hereby assigned, to and for their own use and benefit absolutely, without any lawful let, suit, eviction, or interruption of or by the said W. Jones, his executors or administrators, or any other person or persons whatsoever; and that, free from all further and other bargains, sales, assignments, charges, and encumbrances: and, further, that he, the said W. Jones, his executors or administrators, and all and every other person or persons having or claiming, or who may have or claim any estate, right, or interest in, to, or out of the said hereby-assigned premises, or any part thereof, by, from, through, under, or in trust for the said W. Jones, shall and will, at all times from and after default shall be made in payment of the said sum of 400*l*. and interest, or any part thereof, contrary to the proviso above contained, upon every reasonable request of them the said A. Boyson and J. Hoyer, their executors or administrators, and at the costs and charges of the said A. Boyson and J. Hoyer, their executors, &c., make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable act or acts, deed and deeds, assignment and assignments in the law whatsoever, for the further, better, and more effectually conveying, assigning, and assuring the said vessel or ship and premises hereby assigned, or intended so to be, unto the said A. Boyson and J. Hoyer, their executors, &c., freed and discharged of and from all right and equity of redemption whatsoever, as by them, or

*126] any or either of *them, or by their or any or either of their counsel in the law, shall be reasonably devised, advised, or required; so as such further assurances contain in them no further or other warranty than as against the person or persons who shall be required to ex-

*127]

ecute the same, and so as such person or persons shall not, for the making or doing thereof, be compelled or compellable to go or travel from the place or places of his or their abode: and, lastly, that, during so long time as the sum of 400*l.*, and interest, or any part thereof, shall remain due and unpaid on this present security, the said W. Jones, his executors and administrators, shall not nor will have or take any advantage for the omission of, or want of compliance with, any form or forms of proceeding made necessary by the registry acts now in force, or for any irregularity which may affect or prejudice the transfer or assignment and security hereby made, or intended to be made; nor bring or prosecute any action or actions, suit or suits, against the said A. Boyson and J. Hoyer, their executors, &c., on account of any such omission or irregularity, or otherwise relative thereto. In witness," &c.

Endorsed on this deed was a receipt for the 400*l.* duly signed by W. Jones.

The indenture, when executed, was transmitted to, and received by, the plaintiffs, and was by them, on the 23d of January, 1843, returned to Jones, the bankrupt, with the following letter:—

“London, 23d January, 1843.

“We are in receipt of your esteemed favour of the 21st inst., with bill of sale of the *Eliza Jane*; and we immediately communicated the same to Messrs. De Lisle, Jarmain & Co., and showed them the bill of sale. They, however, returned it to us, with the observation that it had not been endorsed by the Customs, and *consequently the docu- [*128
ment was no security; and we are, therefore, compelled to return
it to you, with the request that you will have it entered at the custom-
house.

(Signed)

“BOYSON & HOYER.”

On the 30th of January, 1843, a fiat in bankruptcy issued against Jones, upon an act of bankruptcy committed on the 28th of the same month. The deed was then, that is, at the time of the act of bankruptcy, in Jones's possession, and was found amongst his papers, and taken by the messenger on the 1st of February, 1843.

On the 11th of February, 1843, the plaintiffs' solicitors applied to T. R. Hutton, the official assignee under the fiat, (one of the defendants,) in a letter, of which the following is a copy:—

“*Re William Jones, of Cardiff.*

“Sir,—We have been directed by Messrs. Boyson & Hoyer to address you, as the official assignee of the above bankrupt, relative to a bill of sale of the ship *Eliza Jane*, which they understand to have come into your possession as official assignee. Messrs. Boyson & Hoyer claim to have this bill of sale delivered to them, as their property. The bankrupt can explain to you that it was sent back to him after he had executed and sent it to Messrs. Boyson & Hoyer, solely for the purpose of being registered. Messrs. Boyson & Hoyer, as at present advised, now

advise you that they claim this deed, and that they also claim to be mortgagees under it of the ship *Eliza Jane*; and any disposal of that ship which may be made contrary to this intimation, will be treated by them as a conversion of their property.

"As soon as the creditors' assignees are appointed, the matter will be put forward in a more formal manner."

On the 10th of March they applied to the solicitors of the assignees, as follows:—

*129]

*" *Re William Jones, of Cardiff.*

"Gentlemen,—We send you on the other side copy of a letter which we wrote to the official assignee, on the 11th of February, relative to the ship *Eliza Jane*: and we are now instructed to ask whether the assignees mean to withhold the bill of sale; and, if so, we are to take such proceedings as may be necessary to obtain the possession of it."

This letter was accompanied by a copy of the preceding. The solicitors to the fiat repudiated (*sic*) the claim set up under the above unregistered indenture; but, inasmuch as they did not dispute the right of the plaintiffs to the piece of paper on which the instrument had been written by themselves, they returned the indenture of mortgage, with the following letter:—

"Bristol, 16th May, 1848.

"We have consulted the assignees respecting Messrs. Boyson & Hoyer's demand; and are instructed to return you the accompanying bill of sale, with a notice that the assignees will dispute any claim which your clients may set up under or by virtue of it. The bill of sale is therefore returned to you, simply as paper the property of your clients."

On the 17th of May, 1848, the defendants served the following notice on the collector and comptroller of the Customs at Cardiff:—

"To the collector and comptroller of her majesty's Customs at the port of Cardiff.

"Take notice, that a fiat in bankruptcy, bearing date the 30th of January, 1848, &c., has been awarded and issued against William Jones, of, &c.; and that the said W. Jones has been duly found and declared to be a bankrupt; and that A. Gibson, of, &c., and J. Februry, of, &c.,

*130] have been duly chosen assignees of the estate *and effects of the said bankrupt; and that the undersigned, T. R. Hutton, has been duly appointed official assignee to the said estate. And also take notice that the said assignees claim, as such, to be entitled to the schooner or vessel called the *Eliza Jane*, of Cardiff, &c., whereof W. Jones was at the time of his bankruptcy sole registered owner, as, on reference to the certificate of registry granted at your port on the 28th of February, 1842, will appear, and whereof the said W. Jones was, at the said time of his bankruptcy, in possession as legal owner. And

take notice, and you are hereby required, not to register or record a certain bill of sale, which was found in the bankrupt's possession at the time of his bankruptcy, bearing date the 21st of January, 1843, and made between the said W. Jones of the one part, and A. Boyson and J. Hoyer, of, &c., of the other part, and under which the said A. Boyson and J. Hoyer claim that the said schooner or vessel was transferred to them by way of mortgage for securing 400*l.* and interest: but take notice that the said assignees deny that any right or title has been passed to the said Messrs. Boyson & Hoyer, the enactments of the ship's registry act not having been complied with at the time of the bankruptcy of the said W. Jones, and the said schooner or vessel, together with the said bill of sale, being at the same time, in his actual custody and possession. Dated, this 5th of May, 1843.

(Signed) "T. R. HUTTON, Official Assignee."

On the 18th of May, the deed was presented by the plaintiffs to the said collector and comptroller of Customs, to be entered; which those officers, in compliance with the notice, then declined to do.

Between the 17th and the 26th of May, the said collector and comptroller forwarded the notice to the board of Customs in London, for orders; and, on the 25th of May, it was returned, with instructions written on it, *that he had no right to refuse to record the mortgage; and, accordingly, on the 26th of May, the said deed was [*131 registered by the said collector and comptroller.

The following is a copy of the entry made in the custom-house register books:

"Custom-house, Cardiff, 26th May, 1843.

"Mr. Jones, of Cardiff, in the county of Glamorgan, timber-merchant, hath transferred, by mortgage-deed dated the 21st of January, 1843, the whole of this vessel to A. Boyson and J. Hoyer, of, &c., merchants, &c., as security for the sum of 400*l.* and interest.

"Recorded duly.

"R. DAW, Collector.

"H. SLADEN, Comptroller."

The vessel, before and up to the time of the act of bankruptcy and *fiat*, was in the possession of a master and crew appointed by the bankrupt. She sailed for Waterford in the month of January, 1843; and, at the date of the *fiat*, was lying at Waterford; from which port she sailed on the 23d of February, bound to Cardiff, where she arrived immediately afterwards, and was seized by the messenger as part of the bankrupt's estate. The assignees then retained possession of the said vessel, and chartered her for several voyages; and she has now been sold, by mutual consent of the plaintiffs and defendants, and the proceeds of the sale are deposited to await the decision of the court.

The plaintiffs, after the deed had been registered at Cardiff, as already described, required the defendants to produce the certificate of the vessel's register at the custom-house, when she was in port, to have

an endorsement of the indenture of the 21st of January, 1848, made thereon: but the defendants refused to do so; and no endorsement of that register was ever made on the certificate of registry.

*182] The plaintiffs, before the commencement of this suit, *demanded possession of the vessel, which the defendant refused to give, and which, for the purposes of this case, is to be taken as a conversion.

The court is to be at liberty, if it shall be so pleased, to draw such inferences as a jury might have drawn.

The question for the opinion of the court is—whether the plaintiffs are entitled to recover. If the court shall be of opinion that they are not, then the plaintiffs agree that a judgment shall and may be entered against them of *nolle prosequi*, immediately after the decision of this case, or otherwise, as the court may think fit. But, if the court shall be of opinion that the plaintiffs are entitled to recover, then the defendants agree that judgment shall be entered against them, by confession, for (a sum to be agreed upon) immediately after the decision of this case, or otherwise, as the court may think fit, and that judgment shall be entered accordingly.

The case was argued in Michaelmas term last, before COLTMAN, MAULE, and CRESSWELL, Js., the lord chief justice (who had been counsel in the cause) being absent.

Channell, Serjt., (with whom was Greenwood,) for the plaintiffs.(a) Two questions are raised in this case—first, whether the defendants, as assignees of Jones, acquired any property in the vessel, by reason of *183] the non-registration of the bill of sale at the date of the *fiat*—*secondly, whether it passed to them as property in the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the true owners.

1. It is submitted that no property in the ship passed to the assignees. This question will depend upon the true construction to be put upon the register act of 3 & 4 W. 4, c. 55. The second section enacts “that no ship or vessel shall be entitled to any of the privileges or advantages of a British registered ship, unless the person or persons claiming property therein shall have caused the same to have been registered in virtue of the 4 G. 4, c. 41, or 6 G. 4, c. 110, or until such person or persons shall have caused the same to be registered in manner therein-after mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry and grant

(a) The point marked for argument on the part of the plaintiffs, was, “that the plaintiffs were entitled to the possession of the vessel, against the assignees, notwithstanding there was no *actual* registration of the bill of sale until after the *fiat*.”

On the part of the defendants—“that the property and right to the possession of the said vessel passed to them as the assignees of Jones, and that the plaintiffs, without due registration according to the provisions of the 3 & 4 W. 4, c. 55, could acquire no title to the vessel, as against the assignees of the bankrupt”—and “that, at the time of the bankruptcy of Jones, the vessel was in his order and disposition.”

such certificate as thereafter directed:" it then gives a form of certificate, and proceeds to enact, that, "on the back of such certificate of registry, there shall be an account of the parts or shares held by each of the owners mentioned and described in such certificate," in the form therein mentioned. The 34th section enacts that "no bill of sale, or other instrument in writing, shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, *or for any other purpose*, until such bill of sale, or other instrument in writing, shall have been produced to the collector and comptroller of the port at which such ship or vessel is already registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be; nor until such collector and comptroller respectively shall have *entered* in the book of such last registry, in the one case, or in the book of such registry *de novo*, after all the requisites of law for such registry *de novo* shall have been duly complied with, in the other case, (and which they are respectively hereby *required [134 to do upon the production of the bill of sale or other instrument for that purpose,) the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and, further, if such ship or vessel is not about to be registered *de novo*, the collector and comptroller of the port where such ship is registered, shall, and they are hereby required to, *endorse* the aforesaid particulars of such bill of sale or other instrument, on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following"—giving a form of entry—"and forthwith to give notice thereof to the commissioners of customs; and, in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and comptroller are hereby required to certify, by endorsement upon the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and endorsed upon the certificate of registry, as aforesaid." The 35th section enacts, "that, when and so soon as the particulars of any bill of sale or other instrument, by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the endorsement [135 to be made *upon the certificate of registry of such ship or

vessel in manner thereafter mentioned." The 36th section enacts, "that, when and after the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry; or, in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged," &c. The 37th section enacts, "that, if the certificate of registry of such ship or vessel shall be produced to the collector and comptroller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and comptroller of such port as before directed, it shall be lawful for the collector and comptroller of such other port to endorse on such certificate of registry (being required so to do) the transfer mentioned in such bill of sale; and such collector or comptroller shall give notice thereof to the collector and comptroller of the port to which such ship or vessel belongs, who shall record the same in like manner *136] as if they had made such endorsement *themselves, but inserting the name of the port at which such endorsement was made; provided always, that the collector and comptroller of such other port shall first give notice to the collector and comptroller of the port to which such ship or vessel belongs, of such requisition made to them to endorse the certificate of registry; and the collector and comptroller of the port to which such ship or vessel belongs, shall thereupon send information to the collector and comptroller of such other port, whether any, and what, other bill or bills of sale have been recorded in the book of the registry of such ship or vessel; and the collector and comptroller of such other port, having such information, shall proceed, in manner directed by this act in all respects, to the endorsing of the certificate of registry, as they would do if such port were the port to which such vessel belonged." The 42d section enacts, "that, when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then, and in every such case, the collector and comptroller of the port where the

ship or vessel is registered, shall, in the entry in the book of registry, and also in the endorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such *transfer be deemed, by reason thereof, [*137 to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares, so transferred, available, by sale or otherwise, for the payment of the debt or debts, for securing the payment of which, such transfer shall have been made." And the 48d section enacts, "that, when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of, the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid; but that such mortgage or assignment shall take place of, and be preferred to, any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law, &c. notwithstanding."

By the act, two things are required to give full validity and effect to the bill of sale of a ship, viz., entry in the book of registry, and endorsement on the certificate of registry. It will be contended on the part of the defendants, that, by reason of the want of an entry of the [*138 *bill of sale in the book of registry, and, perhaps also, of the absence of an endorsement on the certificate of registry, the property in the schooner remained in Jones down to the time of his bankruptcy, and consequently passed to his assignees; or, in other words, that an unentered bill of sale is of no more efficacy than an unexecuted one. It may be that registration is essential to *complete* the title of the mortgagees under the bill of sale. But, subject to the exception in the

35th section, so soon as the bill of sale was registered, their title became complete and indefeasible from the time of the execution of that instrument. The bankrupt, at all events, was not entitled to the property legally and equitably: some interest clearly passed to the plaintiffs. Suppose, instead of becoming bankrupt, Jones had died, could not the plaintiffs have registered the indenture, so as to make a valid title as against his representatives? The words of section 34 may be satisfied by holding them to mean that no bill of sale shall be effectual to pass the legal property in the ship, until registration. The right of the mortgagees to have the instrument registered, was irrevocable; and the fact of its not having been entered in time, was attributable to the bankrupt's own misconduct. No period is limited for the entry to be made: but the general rule is, that where the time for doing an act is not precisely limited and defined, the law will imply that it shall be done within a reasonable time. Thus in *Palmer v. Mozon*, 2 M. & S. 43, it was held that a bill of sale of three-fourth parts of a ship, then being in the port to which she belonged, executed by three or four joint-owners, transferred the property to the vendee at the time of its execution, if, at that time, a memorandum of such transfer were endorsed on the certificate of registry, and signed by the three, and a copy of such endorsement were delivered to the proper officer on the next day, and afterwards, *within a reasonable time*, the other owner executed the bill of sale, and signed the endorsement, and a copy of the endorsement, signed by the four, were left with the proper officer: and, therefore, where, upon a writ of *fi. fa.* against one of the three, the sheriff seized his share, after the execution of the bill of sale and signature of the endorsement by the three, but before the delivery of the copy of such endorsement to the proper officer,—it was held that the sheriff might abandon the seizure, and return *nulla, bona*. "What is required to be done within ten days," says Lord ELLENBOROUGH, "must undoubtedly be done within ten days: but, where no time is limited, the act must be done within a reasonable time: Lord COKE says, where no time is limited, the law appoints the time; and he notes the diversities where a party has, during his whole life, or has only a convenient time, according to the subject-matter.(a) *Id certum est quod certum reddi potest*: a reasonable time is as capable of being ascertained by evidence, and, when ascertained, is as fixed and certain, as if fixed by act of parliament."(b)

2. To entitle the assignees to claim the vessel by virtue of the 6 G. 4, c. 16, s. 72, two things must concur—the plaintiffs must have been the true legal owners at the time of the bankruptcy of Jones—and the ship must then have been in his possession with *their consent*, as in *Hay*

(a) Co. Litt. 208 b.

(b) And see *Lord Crumwell v. Andros*, 2 And. 69, 73; *Startup v. Macdonald*, 2 M. & G. 395, 2 Scott, N. R. 485; S. C. in error, 6 M. & G. 593, 7 Scott, N. R. 269.

v. Fairbairn, 2 B. & Ald. 198, and *Monkhouse v. Hay*, 2 Brod. & B. 114, 4 J. B. Moore, 549, 8 Price, 256. At the time of the bankruptcy, the plaintiffs were not in a situation to take possession of the ship as the legal *registered owners; they, therefore, clearly were not at that time the true owners within sect. 72. Assuming, how- [*140
ever, that they *were* the true owners, can it be said that the bankrupt had possession with their consent? That is clearly negatived by the facts stated in the case. On the 21st of January, 1843, the indenture was executed by Jones and was by him transmitted to the plaintiffs in London. On the 23d they returned it, with a request that he would have it entered at the Custom-House at Cardiff. In breach of his duty, the bankrupt retained it until the *fiat* against him issued. He clearly did not hold it with the plaintiffs' consent.

Talfourd, Serjt. (with whom was *Butt*), *contra*. Independently of the registry act, the legal interest in the vessel passed by the bill of sale to Boyson & Co.; and, they having suffered it to remain in the possession and under the control of the bankrupt down to the time of his bankruptcy, even if all the requisites of the statute 3 & 4 W. 4, c. 55, had been complied with, the property and right to the possession of the ship would pass to the defendants as assignees. In *Monkhouse v. Hay*, it was expressly determined that the statutes 26 G. 3, c. 60, and 34 G. 3, c. 68, (the provisions of which are similar in this respect to those of the statute now in question,) did not tend to repeal or prevent the operation of the 21 Jac. 1, c. 19, s. 11, on British-registered ships: and, therefore, where the owner of a ship assigned his interest in her to J. S., by deed, who became the registered owner, but, by his permission, the assignor continued to have the ship in his possession, and exercised all acts of ownership over her until he became bankrupt;—it was held that the property in the ship passed to the assignees, although the register had been duly endorsed to J. S. before the act of bankruptcy.

Treating the entry of the bill of sale at the custom-house as the mode by which alone the legislature *intended that the interest in property of this description should pass, how is this case [*141
affected by the statute? The 81st section provides that the sale of a registered ship shall be by an instrument in writing, containing a recital of the certificate of registry, and that "otherwise, such transfer shall not be valid or effectual *for any purpose whatsoever*, either in law or equity." Section 84 enacts that no instrument shall be valid to pass the property in a ship, "or for any other purpose," until such bill of sale shall have been registered by the proper officer. And the 85th section enacts, that, when and so soon as the instrument shall have been registered, it shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every persons whatsoever, and to all intents and purposes, except as against such subsequent pur-

chasers and mortgagees who shall first procure an endorsement on the certificate of registry, in the manner thereafter mentioned. [MAULE, J. If Jones had executed a second bill of sale to another party, and such second bill of sale had been duly registered and endorsed, the latter would alone have prevailed. But, supposing there is no second assignment, does not the bill of sale operate to vest the property from its date, when the condition of endorsement has been performed? Would the death of Jones before the entry and endorsement were made, have defeated the sale?] The general scope of the act is, to prevent the property in British ships being held other than by those whose titles shall duly appear on the register: and this object can only be attained by holding that no effect at all is to be given to a bill of sale, or other conveyance, until properly registered.

Channell, Serjt., in reply, referred to *Dixon v. Ewart*, 3 Meriv. 322, *142] where Lord ELDON, acting upon the opinions *of DALLAS, C. J., and ABBOTT, J., held, "that the transfer of a ship at sea, if all the requisites of the registry acts have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be divested by the neglect of the vendor to make the endorsement on the certificate of registry within the ten days after the return of the ship into port: and that, if a bankruptcy intervenes before the arrival of the ship, the endorsement, being only an act of duty on the part of the vendor, and *passing no interest*, may be performed by the bankrupt himself." *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court.

This case was argued before my brothers COLTMAN, CRESSWELL, and myself, in the absence of the lord chief justice, who was counsel in the cause. The judges who heard the argument have agreed on the judgment which I am to pronounce. This was an action of trover for a ship. The defendants pleaded not guilty, and that the plaintiffs were not possessed. Issue being joined on these pleas, a judge's order was made, by consent, under which a case has been stated for the opinion of the court.

The plaintiffs claimed the ship,—which was a British-registered ship,—as mortgagees of William Jones, the owner, under a bill of sale executed before, but not registered till after, his bankruptcy. The defendants are the assignees of William Jones, and claimed the ship, either as having passed to them as the property of the bankrupt, under the *fiat*, or, (on the supposition that the plaintiffs acquired some interest under the bill of sale,) as having been in the order and disposition of the bankrupt as reputed owner, at the time of the bankruptcy, with the consent of the true owners.

*148] The right to the ship in question depended on the *construction of the provisions of the act of 3 & 4 W. 4, c. 55, which

was the register act in force at the time the facts which raise the question, took place.

The 31st section of that statute provides that the sale of a registered ship shall be by an instrument in writing, containing a recital of the certificate of registry, "otherwise, such transfer shall not be valid or effectual for any purpose whatsoever, either in law or equity." Section 34 provides that no instrument shall be valid to pass the property in a ship, or *for any other purpose*, until such bill of sale shall have been registered by the proper officer. Section 35 enacts, that, when and so soon as the instrument shall have been registered, it shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure an endorsement on the certificate of registry in the manner thereafter mentioned—an exception not applicable to the present case, in which there has been no such endorsement.

It was contended for the plaintiffs, that, although, if no registry had taken place, they would have had no title, yet that, when the registry took place, the title of the plaintiffs became complete and indefeasible from the time of the execution of the bill of sale, and defeated the title which the defendants, as assignees, would otherwise have had, under the bankruptcy. But we think that the true construction of the enactments in question will not allow the bill of sale to have this effect. The general intention of the act, and the words of the enactments, are, both, at variance with the construction of the plaintiffs. The general intention of the act is, to prevent the property in British ships being held by any others than those whose title appears on the register; and this will be best effected by treating a bill of sale *as not in legal existence [*144 till registered. The words of section 34, which provides that no bill of sale shall be valid and effectual to pass the property, "or for any other purpose," *until* registered, lead to the same conclusion. It cannot be successfully contended that these words will be satisfied by holding that the bill of sale had no operation before registration; but that, when registered, it operated by relation to the time of its execution; for, on that supposition, the existence of the bill of sale at the time of the bankruptcy *would* have had, at that time, the effect of preventing the assignees obtaining an indefeasible title, which, but for the bill of sale, they certainly would have had; and any instrument having this very important effect could not, with any propriety, be said not to be valid or effectual *for any purpose*.

It is to be observed that the section does not merely say that a deed before registration shall not be sued upon, or shall not pass the property; but that it shall not be valid and effectual to pass the property, or for any other purpose. If the plaintiffs' construction be the true one, this deed did, immediately on the execution, and before registration, confer

on the mortgagees a power of defeating a title acquired after the execution and before registration; and could not, therefore, be said not to be then valid and effectual for any purpose. It is certain, that, if the owner of the ship, on the day on which he became bankrupt, had (instead of committing an act of bankruptcy) executed a bill of sale to the defendants, which had been immediately registered, the defendants would, by the express provisions of s. 35, have acquired a title immediately on the registration, which would not have been defeated by the subsequent registration of the plaintiffs' bill of sale. If, then, notwithstanding the plaintiffs' bill of sale, the property in the ship was sufficiently in the *145] owner to enable *him effectually to transfer it by a subsequent deed registered forthwith,—though such a deed would be in derogation of the express terms of the plaintiffs' bill of sale,—how can it be contended that the plaintiffs' bill of sale prevented a transfer by force of the bankrupt law? The true effect of the enactments appears to be, that, until registration, every disposition by the act of the vendor, or of the law, is as effectual as if the unregistered deed had not existed, and is not defeated by the subsequent registration,—whether such intermediate disposition be one which requires registration, and is registered, or does not require it, and is not registered.

A review of the cases of *Palmer v. Mozon*, 2 M. & S. 43, and *Dixon v. Ewart*, 3 Meriv. 322, which were cited for the plaintiffs, and of the statute on which those cases were decided, will be found to confirm the opinion we have formed on the statute 3 & 4 W. 4.

The statute which was the subject of construction in the cases cited, was, the 34 G. 3, c. 68. That act provides in s. 15, that, on transfer of property in a registered ship, an endorsement shall be made on the certificate of registry, and delivered to the persons authorized to make registry,—“otherwise, such sale, or contract or agreement for sale, shall be null and void to all intents and purposes whatsoever.” Section 16 requires, in case of a ship absent from port, that the bill of sale shall be registered, and that the endorsement shall be made on the certificate of registry within ten days after her return; with a similar provision, making void the bill of sale, on failure of compliance with these requisites.

It is manifest that the words of this statute are very different from those of the 3 & 4 W. 4, c. 55, which (ss. 34, 35) provides that no bill *146] of sale shall be valid *and effectual till registered; and when registered, that it shall be valid and effectual; thus conferring validity on the bill of sale on its registration, and taking it away till registration: whereas, the 34 G. 3 had no such provision, either taking away or conferring validity. That statute directed that the registration and endorsement should be made, and provided that *otherwise*, i. e. if these requisites were not performed, the bill of sale should be void. When the registration and endorsement had been made, the bill of sale

was taken out of the operation of this avoiding clause, and stood on the same ground as it would have done if there had been no such clause in the act, i. e. as a bill of sale operating from its execution, according to its terms: and, in conformity with this view, in the cases before mentioned, of *Palmer v. Mozon* and *Ewart v. Dixon*, it was held, that, under the 34 G. 3, c. 68, the interest passed by the bill of sale, on its execution; and that the performance of the requisites as to registration and endorsement, was a condition subsequent, the failure to perform it defeating the interest which had vested by the bill of sale immediately on its execution. That this is the true construction of the act of 34 G. 3, c. '8, we think, is not to be disputed. But it is to be observed that the cases cited overruled the doctrine as to the construction of that act on which the Court of King's Bench, in the case of *Moss v. Charnock*, 2 East, 399, proceeded. The decision itself is, indeed, in those two cases, said to be sustainable on a ground on which the Court of King's Bench did not proceed, but which it expressly repudiated,—that the requisites were not performed in a reasonable time. The ground on which the court *did* proceed in *Moss v. Charnock*, was, that the statute was to be construed “as enacting that no bill of sale or other such instrument shall be allowed to have any *operation or effect, until the requisites imposed on the parties to the sale [147 are complied with, and by not allowing any relation to hold good so as to make the conveyance effectual from any antecedent time.” It must be owned that this is a somewhat forced construction, in which the words of the enactment are made to give way to the presumed intention of the act. But the reasons given by the court for construing the statute as they did,—though, according to later cases, they ought not to have induced the court to put the construction on that act which they did put,—go far to show, that, although the legislature may not have intended the construction adopted in that case, the object of the act, and the convenience of the public and the parties, would have been best consulted by an enactment which might possibly have that construction. “The public,” says the court, in giving judgment in *Moss v. Charnock*, “would be best secured by holding that no interest shall pass from any owner in British ships to any other, until the public has that information which is so essential to its commercial welfare.” The judgment also forcibly points out the inconvenience—to the public, of holding that an indefinite time,—and to the parties, of holding that a reasonable time, should be allowed for complying with the requisites of the act.

As the later cases of *Palmer v. Mozon* and *Ewart v. Dixon* established that the inconvenient construction which the court sought to avoid in *Moss v. Charnock* was the true construction of the 34 G. 3, c. 68, it became important that the law should be altered, so as to secure the advantages of that construction, which the court, looking to the

policy of the act, and the convenience of parties, rather than to the words of the legislature, had erroneously adopted; and, accordingly, it will be found, that, in the next registration act, that of 6 G. 4, c. 110, *148] s. 37, as well as in that of 3 & 4 W. 4, c. 55, *s. 84, the legislature abandons the language used in the 84 G. 3, which imports a condition subsequent, and adopts the words now in question, and which are, in substance, the same as those of the interpretation which the court, in *Moss v. Charnock*, put upon the 84 G. 3, s. 68, thus, by apt words, attaining the object which the Court of King's Bench, in *Moss v. Charnock*, had endeavoured to attain by a construction of the words of the 84 G. 3, c. 68, which they would not bear. It may be observed, that, in further pursuance of the object of making the title of the purchaser dependent on the registration only,—a public act, and one which the purchaser can procure to be done without the concurrence of any other person except the public officers, who are bound to act on his application,—the 3 & 4 W. 4, c. 55, as well as the 6 G. 4, c. 110, no longer makes the bill of sale void for want of an endorsement of the certificate of registry, as it was under the 84 G. 3, c. 68, but gives effect to the registration, notwithstanding there may be no endorsement, in all cases except that of a subsequent registered purchaser who obtains an endorsement, as to which s. 36 provides that the first registered purchaser shall have ample time to procure an endorsement before any subsequent purchaser can register. The whole effect of the 3 & 4 W. 4, c. 55, as to registration, seems to be, that it is the registration, and not the execution of the bill of sale, from which its operation, for any purpose, commences; that, on registration, it operates on any interest which the party making the transfer has at that time; but that all rights which have accrued before registration, are no more affected by it than they would have been if the deed had been executed, as well as registered, after they had accrued.

For these reasons, we are of opinion that the ship passed to the assignees, the defendants, as part of the property of the bankrupt, and, *149] consequently, that it did *not pass as property of the plaintiffs in the bankrupt's order and disposition, and that there must be, Judgment for the defendants.(a)

(a) See the 8 & 9 Vict. c. 89, which repeals the 3 & 4 W. 4, c. 55, and re-enacts its several provisions, with some alterations.

IRELAND v. THOMSON. *Feb. 1.*

Where, in consequence of damage to a ship during the voyage it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested: and a person employed by him to superintend the sale may lawfully pay over the proceeds to him, or to his order.

ASSUMPSIT, for 2000*l.*, money had and received by the defendant for the use of the plaintiff; 500*l.* interest for the forbearance by the plaintiff, at the defendant's request, of money due from the defendant to the plaintiff; and 2000*l.* money due upon an account stated.

The defendant pleaded—first, non assumpsit—secondly, payment and acceptance of 5000*l.* in satisfaction of the alleged promises, and of the damages sustained by the plaintiff from the non-performance thereof—thirdly, that the promises were made by the defendant jointly with one Harrison Watson, residing out of the jurisdiction of the court, and that the plaintiff was indebted to the defendant and the said H. Watson in the sum of 5000*l.* for work done and materials provided by them for the plaintiff, and for money paid by them at the plaintiff's request, and for interest for the forbearance by them, at the plaintiff's request, of moneys due from him to them, and for moneys due from him to them on an account stated between them; which said sum exceeded the damages sustained by the plaintiff from the non-performance of the said promise, and out *of which sum the defendant offered to set off the amount [*150 of the said damages.

The cause came on for trial before TINDAL, C. J., at the sittings at Guildhall after Trinity term, 1839, when a verdict was found for the plaintiff, for 2000*l.* damages, subject to the opinion of the court upon the following case:—

The plaintiff was the registered owner of the ship *Royal William*, at the time of her being wrecked and sold at the Cape of Good Hope, in September, 1837, as hereinafter mentioned.

On or about the 8th of May, 1837, a charter-party was made between the plaintiff, the owner of the *Royal William*, of the one part, and C. A. Gordon, of the other part. [A copy of the charter-party was annexed to the case, to be referred to, if necessary.] Messrs. Ouchterlony & Co., of London, were jointly interested with Gibson in the charter-party.

By mortgage, dated on or about the 23d of May, 1837,—and which mortgage was then duly entered in the book of registry at the Custom-House in London, and endorsed on the certificate of registry,—the plaintiff duly transferred the said vessel to John Alves Arbuthnot and Alfred Latham, trading in London under the firm of Arbuthnot & Latham, for securing the payment of a certain sum of money, which was unpaid at the time of the remittance of the proceeds of the wreck hereinafter mentioned, and also exceeded the amount of those proceeds.

[This deed was also to be referred to, if necessary. The appendix to the case likewise contained a mortgage-account, showing the state of accounts between the plaintiff and Arbuthnot & Latham.]

Messrs. Arbuthnot & Latham had been the agents of the plaintiff for some time, and effected his insurances, received his freights, &c. On the 18th of May, 1837, they effected a policy on the ship *Royal William*, *151] for *6000*l.* The policy was made in their own names. The premiums paid on this policy were charged to the plaintiff; and the sums paid by the underwriters on the policy were placed to his credit. The sums so paid by the underwriters were, 3000*l.* on the 31st of December, 1837, and 1800*l.* on the 6th of February, 1838.

The following were the endorsements put upon the policy when the above payments were made:—

“Settled, 50 *per cent.* on account of the claims on this policy, without prejudice; payable in one month. London, 31st December, 1837.

“Agreed to settle, a further 30 *per cent.* on this policy; and, the proceeds of the ship not being paid to the assured and it appearing that serious doubts are entertained in regard to the application of such proceeds, it is hereby further agreed that the assured may adopt such measures as they may deem expedient to recover the same, and that the underwriters will bear any loss that may arise from the non-recovery of the proceeds of the vessel. 30*l. per cent.* London, 6th February, 1838. Payable in one month.”

These payments were made before the present action was commenced. The action was commenced on the 19th of April, 1838.

The *Royal William* sailed from the port of London in June, 1837, on a voyage from London to Madras and Calcutta, laden with goods the property of about fifty different persons, and under the command of David Frazer; and, in the course of such voyage, was totally wrecked, with the said cargo, on entering the Cape of Good Hope, on the 19th of September, 1837. The plaintiff had no interest in the cargo or adventure.

Frazer employed Messrs. Thomson, Watson, & Co., merchants at the Cape (the said firm consisting of the defendant and H. Watson,) to *152] superintend the preservation *and sale of the ship, stores, and damaged part of the cargo, and to receive the proceeds thereof.

The ship, stores, and damaged part of the cargo, were sold by auction, by one Jones, an auctioneer at the Cape, who was selected by Thomson, Watson, & Co., for that purpose, with the concurrence of Frazer. The ship and materials sold for the net sum of 18,955.2 rix-dollars, which, at the usual rate of exchange, is, 1421*l.* 12*s.* 10*d.*; and, of this sum, Thomson, Watson, & Co., received from the auctioneer 1102*l.* 7*s.* 3*d.* only, the difference, viz. 319*l.* 5*s.* 7*d.*, being the value of certain articles belonging to the wreck, purchased at the sale by Frazer, and one Anderson, the steward of the vessel; which said sum of 319*l.* 5*s.* 7*d.* was

not paid by Frazer or Anderson, but the whole of it was, by the direction of Frazer, charged in the accounts of Thomson, Watson, & Co., to his credit, as part of the proceeds of the wreck, and to his debit, as money advanced by them.

Thomson, Watson, & Co. made various payments at the Cape of Good Hope, by the direction of Frazer: and, after the sales were completed, and such payments and disbursements made, Frazer went from the Cape to India, in a ship called the Courier, hereinafter mentioned. [The accounts of the disbursements made by Thomson, Watson, & Co., and their account-current, as also the account-sales of the ship and damaged cargo, were annexed to the case.]

Frazer, previously to his departure for India, addressed a letter to Thomson, Watson, & Co., of which the following is a copy:—

“Cape Town, 21st October, 1837.

“Gentlemen,—There are remaining in the Customs warehouse fifty-six packages merchandise, and forty-eight hams, landed undamaged from the wrecked ship *Royal William, late under my command, [*153 which I beg you will forward, by the first favourable opportunity, to Madras, to the consignment of Messrs. Ouchterlony & Co., in order that they may recover the amount of average due on said goods from the respective consignees. On closing the accounts of the said vessel, the balance in favour of me and the late ship Royal William, I shall feel obliged by your forwarding, together with the accounts and vouchers, to Messrs. Ouchterlony & Co. and C. A. Gordon, for appropriation on account of the concern.”

The accounts referred to in this letter are the accounts hereinbefore mentioned; and the vouchers referred to are the vouchers for the said accounts.

The said accounts and vouchers, and a sum of 44605.6 rix-dollars = 3338*l.* 13*s.* 7*d.* sterling, were remitted by Thomson, Watson, & Co., according to the directions in the said letter of Frazer, to Messrs. Ouchterlony & Co. and C. A. Gordon, and duly received by them; the said sum of 3338*l.* 13*s.* 7*d.* being the balance of the account current before referred to and annexed.

Thomson, Watson, & Co., had not any notice in fact, from the plaintiff, or from any other person, not to pay the same according to the directions of Frazer.

The payments and allowance next hereinafter mentioned are not disputed by the plaintiff, as deductions from the proceeds of the wreck:—

“Port charges	-	-	-	-	-	rix-dollars	120	0	0
“Wages	-	-	-	-	-	-	940	2	4
							1060	2	4
“Thomson, Watson, & Co., commission	-	-	-	-	-	-	53	0	0
Rix-dollars							1113	2	4

*154] **"Equal in sterling money to - - - £88 9 10*
"General average and particular charges, being
that proportion of the disbursements made at the Cape
for ship and cargo, which the average-stater in London
employed by Ouchterlony & Co. and Gordon, appro-
riated to the ship.

237 12 10

£321 2 8"

The items next hereinafter mentioned form part of the payments and disbursements made by Thomson, Watson, & Co., at the Cape, by the orders of Frazer: but the plaintiff contends they were not justifiably made, and do not constitute payment or set-off in this action, viz.:—

	*Rix-dollars.	£	s.	d.
"Re-shipping furniture and stores to Captain Frazer - -	45 0 0	3	7	6
"Two trips to barque Courier - - -	6 0 0	0	9	0
"Wagon-hire on furniture and stores belonging to Captain Frazer - - -	9 0 0	0	13	6
"Coolie-hire, receiving and shipping ditto - - -	17 2 0	1	5	11
"Boat-hire, landing passengers and luggage from the wreck, the night the vessel struck on the rocks - - -	304 0 0	22	16	0
"Captain Frazer's order in favour of passengers - -	206 5 2	15	10	0
"Captain Frazer's boarding-house expenses while attending the sale of the wreck - - -	254 2 4	19	1	0
"Dr. McIntyre, (the surgeon of the vessel,) balance of his wages - - -	154 5 2	11	12	0
"Captain Granger, per order of Captain Frazer £209 5 0				
"Midgley, do - - - - -	7 16 0			
"J. Anderson, do - - - - -	88 12 6	4075	5	2
*Premium on insurance of 900 <i>l</i> on chronometer, baggage, and cabin-furniture, per Courier, from Table Bay to Calcutta - - -	307 0 0	23	0	6
"J. Adams, for two tierces of pork - - - - -	172 0 0	12	18	0
"J. Manuel, two bags of rice - - - - -	32 0 0	2	8	0
"Calf & Son, coopering casks for water - - - - -	88 2 4	6	12	6
"J. Hitchcock, repairing piano-forte - - - - -	21 0 0	1	11	6
"G. Herbert, fitting cabins on board the Courier - - -	73 4 2	5	10	4
"G. W. Maclure, butcher, keep of stock - - - - -	115 2 4	8	13	0
"Adams, chronometer-maker - - - - -	20 0 0	1	10	0
"1 Bag coffee, 148 lbs. @ 3 <i>s</i> - - - - -	53 1 0	3	19	8
"2 Bags sugar, 252 lbs. @ 18 - - - - -	43 4 2	3	5	4
"For a sword, account of Mr. Law - - - - -	22 5 2	1	14	0
"Robaix, for razor-strop - - - - -	3 2 4	0	5	0
"Captain Frazer - - - - -	266 5 2	20	0	0
"Mellish - - - - -	243 1 2			
"J. Tartar - - - - -	24 17 11	892	6	0
"J. Johnson - - - - -	235 1 0	17	12	8
"Custom-House, permit, wharfage - - - - -	20 2 0	1	10	5
"Thomson, Watson, & Co., commission - - - - -	269 0 0	20	3	6

£668 2 5'

These items in the account,—the object of which does not appear upon the face of them,—were for the providing and fitting out by Captain Frazer the said ship called the Courier, in prosecution, on behalf of the charterers, of the adventure contemplated by the charter-party, and to convey the passengers and the undamaged part of the cargo

upon the voyage which had been interrupted, and in which ship Frazer himself proceeded to Calcutta.

The plaintiff contends that the defendant is also responsible in this action for the sum of 319*l.* 5*s.* 7*d.*, the price of the articles purchased by Frazer and Anderson, as before mentioned.

The work for which commission is charged by the defendant, as above, was in fact done by Thomson, *Watson, & Co.; and the charges [156 in respect thereof, and of their agency, are fair and reasonable, if such charges can be set off in the present action.

On the 19th of February, 1838, the plaintiff's solicitors wrote to Messrs. Ouchterlony & Co., as follows:—

“We have been requested to address you on the subject of the salvage of the Royal William, lately wrecked at the Cape of Good Hope. We have been requested to claim the proceeds of the vessel, and to take measures for the recovery of them. We beg you to say whether you hold these proceeds, and are prepared to pay the same to the owner of the vessel.”

In reply, the following letter was written on the 3d of March, 1838, by Messrs. Ouchterlony & Co. to the plaintiff's solicitors:—

“In reply to your favour of the 19th ult., we beg to state that we received certain remittances from the Cape of Good Hope on account of the salvage *ex* Royal William, Frazer, wrecked there; that we had a statement prepared by a proper person, from the papers in our possession relative to the affairs; and that we hold at the disposal of the parties interested, who can prove their right, the respective amounts enumerated in the statement, which we have shown unreservedly to all applicants.”

The plaintiff's solicitors also wrote the defendant the following letter on the 19th of February, 1838:—

“We have been desired to address you relative to the proceeds of the sale of the ship Royal William, damaged at the Cape of Good Hope, and sold there, and the proceeds received by your house. The instructions which we have received, are, to apply to you for those proceeds; and we have to request that you will forward *to us a check for [157 the amount, or inform us when they will be ready to be paid, that we may send for them.”

On the 20th February, 1838, the defendant's solicitor addressed the following letter to the plaintiff's solicitor:—

“I am desired by Mr. J. R. Thomson to inform you, in reply to your letter to him of the 19th instant, that the proceeds of the sale of the wreck of the Royal William, and all the accounts connected therewith, have been received by Messrs. Ouchterlony & Co. and C. A. Gordon, to whom I beg to refer you on the subject.”

To this the plaintiff's solicitors, on the 5th of March, replied as follows:—

“It is not material to the party on whose behalf we addressed Mr.

Thomson relative to the proceeds of the Royal William, whether they are paid by him or by Messrs. Ouchterlony & Co.; but, at present, we cannot obtain them from either. It appears that these proceeds amounted to about 1100*l.*: and Messrs. Ouchterlony & Co. inform us that they are prepared only to pay a sum of about 200*l.* You inform us that Messrs. Thomson, Watson, & Co. are not liable to any person on the subject of the application. We were directed to address to Mr. Thomson; which makes us doubt whether there may not be some misconception amongst the parties. We would, therefore, ask of you to be so good as to inform us whether Messrs. Thomson, Watson, & Co. sold the wreck of the vessel, and received the proceeds of it; and, if so, what they have done with the same."

On the 7th of March, the defendant's solicitor again addressed the plaintiff's solicitors, as follows:—

*158] "As the wreck of the Royal William, and the *damaged part of the cargo, were sold by the master of that vessel, from absolute necessity, and 3838*l.* 13*s.* 7*d.*, the proceeds thereof, remitted to, and now actually received in cash by Messrs. Ouchterlony & Co. and C. A. Gordon, I must again refer you to them on the subject. I am not aware what part of the proceeds may be applicable to the wreck; but, as Messrs. Ouchterlony & Co. and Mr. Gordon are in possession of all the vouchers and documents, and have had an estimate made of the proportion due to each claimant, they can, no doubt, give you every necessary information."

208*l.* 2*s.* 2*d.* is the sum due to the ship-owner out of the proceeds of the wreck, over and above the disputed amounts of 578*l.* 2*s.* 5*d.* and 319*l.* 5*s.* 7*d.*; and that sum was, before and at the time of the commencement of this action, in the hand of Ouchterlony & Co., ready to be paid to whomsoever is entitled to it, as having been the owner at the time of the wreck; and has, since the trial of this cause, been paid by them to the plaintiff, under an agreement that such payment should be without prejudice.

The question for the opinion of the court, is whether the plaintiff is, under the circumstances stated, entitled to maintain an action against the defendant to recover any portion of the proceeds of the wreck. If the court shall be of opinion that *no* action is maintainable, then a nonsuit is to be entered. If they shall think an action is maintainable, then the verdict is to be entered for such amount as the court shall direct. The court to be at liberty to draw such inferences and conclusions from the facts of the case, as the jury might have drawn.

The case was argued in Michaelmas term last, before COLTMAN, MAULE, and V. WILLIAMS, Js.

*159] *Crowder (with whom was Greenwood) for the plaintiff.(a)

(a) The points marked for argument on the part of the plaintiff were, "That he is entitled to recover in this action, from the defendant, the entire amount of the net proceeds of the

The plaintiff is clearly entitled to maintain the present action for money had and received, against the defendant, for the whole amount claimed. It appears by the case, that the master was appointed by the plaintiff, the owner of the vessel; and consequently the possession of it was not given up to the charterers. Assuming, therefore, that the action can be supported, it will not be contended that the plaintiff is not the proper party to bring it. The question is, whether the plaintiff, as owner, can sue the defendant for the proceeds of the sale. It will be said, that the defendant is not answerable to the plaintiff, inasmuch as there is no privity of contract between them; and that the defendant was not acting under the plaintiff, but under the master, to whose order he has paid over the proceeds. It is submitted, however, that the plaintiff, and not the master, was the principal of the defendant; *and that it was the duty of the latter to retain the proceeds [*160 for the benefit of the plaintiff. In *Hunter v. Parker*, 7 M. & W. 322, it seems to have been considered that a master, if he has authority to sell the ship, cannot delegate his authority to others. And the sale here must be taken to have been made by the plaintiff, and not by the master. With respect to the disbursements, they were made, not for the benefit of the plaintiff, but of the charterers; and they cannot be set up as against the plaintiff, who is entitled to recover all the proceeds beyond the mere expenses of the sale. If the sale is to be looked upon as a sale by the master, the question is whether he had authority to dispose of the wreck so as to put it out of the power of the plaintiff to recover the proceeds in the present action. As master of the vessel, his authority was of a limited description, and restricted to the necessity of the case. Though he might have authority to sell the ship, under the circumstances stated in the case, such authority would be to sell for the benefit of the owner, and not of the charterers. Assuming he had authority to sell, it does not follow that he had power to dispose of the proceeds as he did. [MAULE, J. The power to sell involves the power to receive the purchase-money.] It is laid down in *Abbott on Shipping*, (8th edit., by Shee, Serjt., p. 138,) that the authority of the master is strictly limited to what is absolutely necessary.

ship and materials, viz. 1421l. 12s. 10d., subject to the agreed deductions, amounting to 321l. 2s. 8d.—that Thomson, Watson, & Co. were not entitled, as against the plaintiff, to debit the account with the amount unpaid by the master and mate at the sale, viz. 319l. 5s. 7d., for articles purchased by and delivered up to them without payment; and that the defendant is, therefore, still liable to the plaintiff for that amount—and that Thomson, Watson, & Co. were not entitled, as against the plaintiff, to make the disbursements and payments enumerated in the case, amounting to 578l. 2s. 6d.; and that the defendant is, therefore, still liable to the plaintiff for that amount in the present action."

For the defendant—"That the proceeds of the wreck of the *Royal William* were not money had and received by the defendant to the use of the plaintiff, for want of privity between them—and that the wreck and cargo having been sold through the defendant, as the agent of Captain Frazer, and the defendant, having, without notice from any person, paid over the whole proceeds to Captain Frazer's order, is discharged, not only as regards Captain Frazer himself, but as regards every person interested in the ship and cargo."

Referring to the case of *Cary and White*, 5 Bro. Parl. Cas. 326, it is said: "This case, while it establishes the principle of the personal responsibility of the owners, shows also that the creditor is required to prove the actual existence of the necessity of those things which give rise to his demand." [MAULE, J. Your points (a) do not suggest that *161] there was no necessity to sell the vessel.] Admitting *the necessity, the master was not an agent to sell in the ordinary way, as, to sell the goods in the market. Where a creditor furnishes goods to the master of a vessel, he must prove the necessity for the articles. So, here, though the sale of the wreck might have been necessary, there was no necessity that the money should be paid to Frazer's order. [MAULE, J. Do you say that the purchaser could not pay the master ready money for the wreck?] He must pay the owner or his agent. [MAULE, J. The owner has not an agent at the Cape. It would lead to great inconvenience, if, in order to limit the power of the master, he was at liberty to sell on credit to any person whom he thought proper.] In *Mynn v. Jolliffe*, 1 M. & Rob. 326, it was held by LITTLEDALE, J., that an agent to sell an estate has not authority to receive the purchase-money. [MAULE, J. The auctioneer has not possession of the estate, or the power to hand it over. A ship must necessarily be delivered over at once to the purchaser.] Even if the master had authority to receive the purchase-money, he could not properly give the defendant an order to credit him to the amount of 319*l.* 5*s.* 7*d.*, for the articles purchased at the sale by himself and the mate. And, with respect to the 578*l.* 2*s.* 5*d.*, it must be taken to have been paid by order of the master for the benefit of the charterers. In *Story on Agency*, p. 75, sect. 98, it is said that, "In some cases, the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage, or implications of law. Thus, an agent employed to make, or negotiate, or conclude a contract, is not, as of course, to be treated as having an incidental authority to receive payments which may become due under such contract." In *Todd v. Reid*, 4 B. & Ald. 210, it was *162] held that an *insurance-broker is only entitled to receive payment for the assured from the underwriter in money; and therefore that a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss, is illegal. *Bartlett v. Pentland*, 10 B. & C. 760, and *Scott v. Irving*, 1 B. & Ad. 605, are to the same effect. [MAULE, J., referred to *Stewart v. Aberdeen*, 4 M. & W. 211.] Here, the defendant knew that the plaintiff was the owner of the vessel; and he was not justified in handing over the proceeds to the charterer. So, also, he was not authorized to make the disbursements mentioned in the case; which clearly were not for the benefit of the owner. Supposing the master had ordered the defendant to buy another ship with the proceeds of the sale, would he have been

justified in so doing? If these payments were allowed, it would open a wide door to fraud. [COLTMAN, J. Is there any distinction between the payment made to the order of the master, and the disbursements?] In *Barker v. Greenwood*, 2 Y. & C. 414, ALDERSON, B., says: "An agent with a general authority, is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. If, therefore, the agent be not a creditor of his principal, he must receive the whole in cash; for, otherwise, he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over." The general principle is further illustrated in Story on Agency, p. 189, sect. 225, where it is said that **"a person dealing with a factor or broker, though a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debts; and, if he receives such a deposit or pledge, the title is invalid, and the property may be reclaimed by the principal."*

Channell, Serjt., (with whom was *Cleasby*,) for the defendant. There was an entire absence of privity between these parties to entitle the plaintiff to maintain an action for money had and received; or, at all events, the defendant discharged himself by the payments made to the order of the captain, and by remitting the balance of the proceeds to England under his directions. The circumstances disclosed in the case clearly show that the sale at the Cape was necessary and proper. Indeed, its propriety cannot be questioned in this action, the owner having adopted the sale by bringing money had and received for the proceeds. In *Hunter v. Parker*, 7 M. & W. 322, the Court of Exchequer intimated an opinion that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested: and they held, that, at all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser, or one claiming under him; and that it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master. Frazer, then, having, under the circumstances, authority to sell, the sale was superintended by the defendant's partner, Watson, and the defendant received the proceeds as Frazer's agent, subject to his orders. **Stephens v. Badoock*, 3 B. & Ad. 354, is a distinct authority to show, that, although Frazer may have been the plaintiff's agent, there was no privity of contract between the plaintiff and Watson or the

defendant. There, J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues, for the client (which he was authorized to do,) and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned; but it did not appear that his intention so to act was known, at the time of the payment, to B. B. afterwards refused to pay the money over to the client; and, on assumpsit brought against him for money had and received, it was held that the action did not lie; for, that the defendant received the money as the agent of his master, and was accountable to him for it, the master, on the other hand, being answerable to the client for the sum received by his clerk, and there being no privity of contract between the plaintiff and the defendant. Besides, here, the ship having been mortgaged, and the defendant not knowing the state of the account between the mortgagor and mortgagee, he could not tell who was entitled to the proceeds. In Story on Agency, sect. 217, pp. 179, 180, it is said that "An agent is not, ordinarily, permitted to set up the adverse title of a third person, to defeat the rights of his principal, against his own manifest obligations to him; or to dispute the title of his principal. If, therefore, he has received goods from his principal, and has agreed to hold them subject to his order, or to sell them for him, and to account for the proceeds, he will not be allowed to set up the adverse title of a third person to the same goods, to defeat his obligations. An *165] exception, however, *is allowed, where the principal has obtained the goods fraudulently, or tortiously, from such third person. The same principle is upheld as well in equity as in law: and, therefore, if an agent receives money for his principal, he is bound to pay it over to him; and he cannot be converted into a trustee for a third person, by a mere notice of his claim. It is upon a somewhat analogous principle, connected with the want of privity, that an agent employed by a trustee is accountable only to him, and not to the *cestui que trust*; and a sub-agent is accountable to the superior agent, who has employed him, and not, generally, to the principal. Cases, however, may occur, where, by the usage of trade, or otherwise, a sub-agent is employed, where the original agent would not be responsible for the conduct of the sub-agent; and where, therefore, the appropriate remedy of the principal would be directly against the sub-agent." The present case does not fall within any of the exceptions put by Dr. Story. It may be, as was ruled in *Mynn v. Joliffe*, 1 M. & Rob. 326, that an agent employed to sell an estate, has not, as such, authority to receive payment. But the contrary is the case with regard to goods: *Capel v. Thornton*, 3 C. & P. 352. If, then, the defendant would have been justified in paying the proceeds of the sale to Fraser himself, he was equally justified in remitting them to his order. With respect to the price of the goods.

bought by the captain and mate at the sale,—if the defendant can be said to have received it, he must be taken also to have paid it over to Frazer. The captain clearly did not exceed his duty in transmitting the undamaged part of the cargo to its original destination.

Crowder, in reply. Admitting that it was necessary, under the circumstances, to sell the ship at the Cape, *and that the captain had authority as the agent of the owner for that purpose, he clearly had no authority to receive, or by his order dispose of, the proceeds. [*166
Cur. adv. vult.

MAULE, J., now delivered the judgment of the court.

This case was argued before my brothers COLTMAN, V. WILLIAMS, and myself, in the absence of the lord chief justice, who was counsel in the cause. The judges who heard the argument have agreed on the judgment I am to pronounce.

This is an action of assumpsit for money had and received by the defendant to the use of the plaintiff, for interest, and for money due on an account stated. The defendant pleaded—first, non-assumpsit—secondly, payment—thirdly, a set-off of money due from the plaintiff and one Harrison Watson, whom the plea alleges to be out of the jurisdiction of the court, and to have made the promises alleged in the declaration jointly with the defendant.

The issues joined on these pleas came on for trial before TINDAL, C. J., when a verdict was found for the plaintiff, subject to a case, which stated, in effect, that the plaintiff was the registered owner of the ship *Royal William* at the time of the transaction in question. The plaintiffs had chartered the ship to Charles Alexander Gordon, for a voyage from London to Madras and Calcutta, and back to London: Messrs. Ouchterlony & Co., of London, were jointly interested with Gordon in the charter-party. The master of the ship for the voyage was David Frazer, mentioned in the charter-party as appointed by the owner. The ship had also been mortgaged by the plaintiff, for securing the payment of a sum of money, which was unpaid at the time of the remittance of the proceeds of the wreck, and exceeded the amount of those proceeds. The mortgagees had *effected a policy of assurance on the ship, and had received money from the underwriters, for which they had given credit to the plaintiff. The ship sailed on the voyage, with a cargo belonging to fifty different persons, and, with the cargo, was totally wrecked at the Cape of Good Hope. The plaintiff had no interest in the cargo or adventure. The master, David Frazer, employed the defendant and his partner Harrison Watson, who were merchants at the Cape, to superintend the preservation and sale of the ship, stores, and damaged part of the cargo, and to receive the proceeds thereof. The defendant and his partner, accordingly employed an auctioneer, who sold the ship, damaged cargo, and stores. The net proceeds of the sale were received by the defendant and his partner, with the exception [*167

of 319*l.* 5*s.* 7*d.* which was the amount of certain articles belonging to the wreck, which had been bought at the sale by the master, Frazer, and Anderson, the mate; which was not actually paid by Frazer or Anderson to the auctioneer, or by him to the defendant and his partner, but which, by order of Frazer, had been credited to him by the defendant and his partner as money received on his account, and debited to him as money advanced to him.

The defendant and his partner, before any claim made on them by the plaintiff, or any one else, paid over the whole of what they had received on account of ship and cargo, either to the master, Frazer, or to his order, at the Cape, or to Ouchterlony & Co., to whom Frazer had directed them to remit the balance, on account of whom it might concern, with the exception of what they retained to cover the disbursements necessarily incurred by them in the execution of the duty of superintending the preservation and sale of the ship and cargo, and their own charges for agency, which were fair and reasonable.

*168] *Under these circumstances, the plaintiff insists that the defendant is liable to pay him the whole or some part of what was received by him and his partner on account of the ship. The defendant insists that he was accountable to Frazer only, and that he is not accountable to the plaintiff; or, at least, that, after having fully accounted to Frazer, and paid over the balance to his order, he is not liable to the plaintiff.

There can be no doubt that the sale was, under the circumstances, necessary; and, indeed, this was not disputed on the argument. Where a ship continues to retain the character of a ship, and to be capable of being used as such, with or without repairs, difficult questions may arise as to the master's authority to sell; and a sale, in such a case, is to be viewed with suspicion; the master's duty being, in general, to proceed on the voyage if possible, or, at least, not to sell the ship without a strong necessity, or the express authority of the owner. But, in the present case, where the ship is totally wrecked, and a large part of the cargo damaged, in a distant country, there can be no doubt of the right and duty of the master to sell: indeed, it does not appear what other course, consistent with any regard to the interest of those concerned, it was possible for the master to adopt. But the plaintiff, though not disputing the right to sell, denies the right of the master to receive the proceeds, or, at least, to dispose of them, by ordering the defendant to pay them, either to persons at the Cape, or to Ouchterlony & Co., of London, to whom the balance was remitted. With regard to the right of the master to receive the proceeds, the case of *Mynn v. Joliffe*, 1 M. & Rob. 326, was cited, in which it was decided that an agent employed to sell an estate is not, as such, authorized to receive the purchase-money. And there *is no doubt, that, on the sale of an estate, to imply such an authority, would be most inconvenient

*169]

and unnecessary; it being clearly for the interest of the vendor, that he, and not his agent, should receive the purchase-money; and no inconvenience to any one arising out of the limit to the authority of the agent which excludes his right to receive the money. The proper course is, clearly, that the vendee should retain the money, and the vendor the estate, till the conveyance is made; and thus neither of them runs any risk of losing the money. But, in the present case, if the master was not to receive the money, he must either give credit to the purchasers of the ship and cargo, leaving the owners to receive it from them, or must employ some third person, of his own selection, to receive the money from the purchasers, and pay it to those who were interested in the ship and cargo. The inconvenience of either of these alternatives is so great and manifest, that it leaves no doubt that the authority of the master to receive the proceeds is a necessary incident to his authority to sell. And it appears to us, that an authority to receive the proceeds involves an authority to order payment of them *bond fide* to such persons as the master may think fit; a payment under such an order being, in effect, a payment to the master. It differs from the cases cited, of payments where no money is disbursed by the debtor, or received by the agent, but where the debt of the agent is discharged by being set off against the money which he has to receive from his creditor on account of his principal.

In the present case, the defendant actually pays the money, and has no advantage which he could not have if he paid it into the hands of the master. In the case of the set-off, the debtor would gain an advantage by his mode of dealing with the agent, which he could not have had if he had dealt with the principal.

*The payments having been ordered and made *bond fide*,— [*170 which we must take to be the case, nothing being stated in the case, or suggested in the argument, to the contrary,—it does not appear to us to be material for what purpose they were ordered, any more than it would be material to inquire into any application which the master might have made of money paid into his hands.

The sum of 819*l.* 5*s.* 7*d.*, the amount of goods bought by the master and mate, does not, we think, fall under a different rule from the rest of the proceeds of the sale. It might, indeed, be said not to have been money actually received by the defendant: but we think it was properly treated by him, under the order of the master, as having been received for the master, and advanced to him by his order. This sum of money, together with that paid, under the master's orders, to persons at the Cape, and to Ouchterlony & Co., and with that properly retained by the defendant and his partner on account of their disbursements and services, constitutes the whole amount with which the defendant is in any way chargeable; and, this having been properly paid and retained, it follows that the defendant has duly accounted for all that he was answerable for.

Whether the action could have been maintained, if the plaintiff, or all those interested in the ship and cargo had intervened before the money had been paid by the orders of Frazer, it is not necessary to determine. But there are strong reasons for considering the defendant and his partner as the agents of Frazer only, and not accountable to those interested in the ship and cargo, even if they *had* intervened before payment. In a learned work cited on the argument—Story on Agency, *171] § 203, n.—the author states the rule thus: “A sub-agent employed *by an agent is in general accountable to the agent only, and not to the principal; for, there is no reciprocity of contract between them:” and this doctrine is supported by several cases which he refers to, amongst which are the cases of *Stephens v. Badcock*, 3 B. & Ad. 354, where the court held that a clerk who had received money for his master on account of the plaintiff, was not answerable to the plaintiff, whose remedy was against the master, though the clerk had not paid the money to him—*Cartwright v. Hateley*, 1 Ves. jun. 292, where a son, employed under, and accountable to, his father, was held not to be accountable to his father’s principal—and *Pinto v. Santos*, 5 Taunt. 447, 1 Marsh. 132, (which in its circumstances bears some resemblance to the present case,) where it was held that bankers, who had received from an agent the proceeds of a ship which belonged to different persons in different shares, with notice of the agency of the party from whom the money was received, and of the rights of those who were entitled to it, were liable to account to the agent only from whom they received the money, notwithstanding the intervention of the plaintiff, who was entitled to the largest share. See also the case of *Sims v. Brittain*, 4 B. & Ad. 375, 1 N. & M. 554, in which the surviving part-owners of a ship were considered not entitled to maintain an action for money had and received against persons whom a deceased part-owner (who was the ship’s husband) had employed to receive and pay money on account of the ship,—on the ground of want of privity between the plaintiffs and the defendants.

The principle on which these cases were determined would probably govern the present case, if the circumstances required its application.

But, the defendant and his partner having duly paid over, under sufficient authority, all for which they were *liable, before any intervention of the plaintiff, or any other of those interested in the fund, we think it clear that the defendant is not now liable to the plaintiff, but is protected by his plea of the general issue, if he never could have been liable; or by the pleas of payment and set-off, if his liability was determined by his accounting; in either of which events, by the agreement of the parties, a nonsuit is to be entered.

Judgment of nonsuit.

WEST v. NIBBS and WINDLEY. Feb. 15.

A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he *retains possession* of the goods distrained—although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in *trover*.

In trespass against B and C. for seizing and converting the goods of A., B. *alone* justified the seizure and impounding of the goods as a distress for rent, within thirty days after they had been wrongfully removed from the demised premises. A. new assigned, that he brought his action, not for the trespasses in the plea mentioned, but for that B., after the seizure, and after payment and acceptance of the rent and expenses, and after he ought to have restored to A., the goods so distrained, retained possession thereof, and sold and disposed of them;—*Scilicet*, that this was no departure.

Quære, whether departure may be taken advantage of on *general demurrer*.

TRESPASS. The declaration stated that the defendants, on the 5th of February, 1846, with force and arms, &c., seized, took, and carried away certain goods, chattels, and effects, to wit, &c., of the plaintiff, of great value, to wit, &c., and converted and disposed of the same to their own use, &c.

The defendant Windley pleaded not guilty only.

The defendant Nibbs pleaded separately—first, that the goods, chattels, and effects in the declaration mentioned were not, nor were nor was any or either of them, the plaintiff's, in manner and form, &c.—secondly, that, *before the said time when, &c. in the declaration mentioned, to wit, on the 20th of March, 1805, one Brandon was seised in his demesne as of fee of and in a certain piece or parcel of ground situate and being in the parish of St. Mary, Newington, in the county of Surrey, and, being so seised, Brandon afterwards, and before the house hereinafter mentioned had been or was erected, and long before the said time when, &c., to wit, on, &c., aforesaid, by a certain lease, &c., demised, &c., amongst other hereditaments, the said piece or parcel of ground, to one Brooker, his executors, &c., for the term of fifty-seven years from the 25th of December, 1804; and that, by virtue of that demise, Brooker afterwards, and before the said time when, &c., entered into the said close, and became and was thereof possessed for the said term so to him therein granted as aforesaid: that Brooker, being so possessed of the said close, afterwards, and during the continuance of the said term, and before the said time when, &c., to wit, on, &c. last aforesaid, erected, made, and built in and upon, and affixed and annexed to, the said piece or parcel of ground, the said house hereinafter mentioned, which thereupon then became and was part and parcel of the said piece or parcel of ground: that, after Brooker had so erected the said house, and during the continuance of the said term, and while Brooker was so possessed of the said house for the said term so granted as aforesaid, and before the said time when, &c., to wit, on the 7th of August, 1806, he, Brooker, by a certain note in writing, signed by him, and bearing date the day and year last aforesaid, did bargain, sell, assign, transfer and set over, unto one W. Gar-

diner, his executors, &c., amongst other hereditaments, the said house with the appurtenances, *habendum* to W. Gardiner, his executors, &c., for the residue of the said term of fifty-seven years then to come and unexpired; and that, by virtue of that assignment, W. Gardiner afterwards, to *wit, on the 7th of August, 1806, entered into and *174] upon the said house, and became and was possessed of the said house, with the appurtenances, for the residue of the said term so thereof granted as aforesaid: that W. Gardiner, being so possessed of the said house, with the appurtenances, afterwards, and during the said term, and before the said time when, &c., to wit, on the 12th of December, 1810, and before the 1st of January, 1838, duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and thereby, amongst other things, appointed one W. B. Gardiner sole executor thereof: that afterwards, and during the said term, and before the said time when, &c., to wit, on the 14th of April, 1821, W. Gardiner died so possessed of the said house, with the appurtenances, for the residue of the said term so granted as aforesaid, without revoking or altering the said will,—after whose death, to wit, on the day and year last aforesaid, the said W. B. Gardiner duly proved the said last will and testament, and took upon himself the burden of the execution thereof; whereupon and whereby the said W. B. Gardiner then became and was possessed of the said house, with the appurtenances, for the residue of the said term so granted as aforesaid: that, the said W. B. Gardiner being so possessed of the said house, with the appurtenances, for the residue of the said term, after the death of the said W. Gardiner, and during the continuance of the said term, and before the said time when, &c., to wit, on the 1st of January, 1822, he the said W. B. Gardiner, by a certain note in writing, signed by the said W. B. Gardiner, and bearing date the day and year last aforesaid, did bargain, sell, assign, transfer, and set over unto one W. A. Popley, amongst other hereditaments, the said house, with the appurtenances, *habendum* to Popley, his executors, &c., for and during the residue of *175] the said term of fifty-seven years then to come and *unexpired: that, by virtue of such last-mentioned assignment, Popley afterwards, to wit, on the day and year last aforesaid, entered into, and was possessed of, the said house, with the appurtenances, for the residue of the said term so thereof granted as aforesaid: that, Popley being so possessed of the said house, with the appurtenances, for the residue of the said term, and during the continuance of the said term, and before the said time when, &c., to wit, on the 7th of March, 1840, he the said W. A. Popley, by a certain note in writing, signed by him, and bearing date the day and year last aforesaid, did bargain, sell, assign, transfer, and set over unto one C. Herring, amongst other hereditaments, the said house, with the appurtenances, *habendum* to Herring, his executors, &c., for and during the residue of the said term of fifty-

seven years then to come and unexpired; and that, by virtue of such last-mentioned assignment, Herring afterwards, to wit, on the day and year last aforesaid, entered into, and became and was possessed of, the said house, with the appurtenances, for the residue of the said term so thereof granted as aforesaid: that, the said C. Herring being so possessed of the said house, with the appurtenances, for the residue of the said term, and during the continuance of the said term, and before the said time when, &c., to wit, on the 6th of September, 1842, he the said C. Herring, by a certain note in writing, signed by him, and bearing date the day and year last aforesaid, did bargain, sell, assign, transfer, and set over unto the defendant Nibbs, amongst other hereditaments, the said house, with the appurtenances, *habendum* to the defendant Nibbs, his executors, &c., for and during all the residue and remainder then to come and unexpired of the said term of fifty-seven years so granted as aforesaid; and that, by virtue of such last-mentioned assignment, the defendant Nibbs afterwards, to wit, on the day and year last aforesaid, entered into, and became and was possessed of, the said house, with the appurtenances, for the residue and remainder of the said term so granted as aforesaid: that he, Nibbs, being so possessed of the said house, with the appurtenances, afterwards, and during the said term so granted as aforesaid, and before the said time when, &c. in the declaration mentioned, to wit, on the 29th of September, 1845, demised the said house to the plaintiff, to have and to hold the same to the plaintiff, from the day and year last aforesaid, for one quarter of a year, and so on from quarter of a year to quarter of a year, so long as the defendant Nibbs and the plaintiff should respectively please, at the yearly rent of 20*l.* 16*s.*, to be therefore paid to the defendant Nibbs by the plaintiff, by thirteen equal payments in the year, one of such payments to be made every four weeks of the said term; and that, by virtue of such demise, the plaintiff, afterwards, and before the said time when, &c., in the said declaration mentioned, to wit, on the 30th day of September, 1845, entered into and upon the said house, and became and was possessed thereof for the said term so to him thereof granted as aforesaid, and continued so possessed as tenant thereof to the defendant Nibbs for a long time, namely, until and on the 19th of January, 1846, and from thence until and at the time of the fraudulent removal hereafter mentioned, and from thence until and at the said time when, &c. in the declaration mentioned,—the reversion thereof, at and during all the times which the plaintiff was so possessed as aforesaid, belonging to the defendant Nibbs for all the residue of the first-mentioned term: that, just before the said time when, &c., and during the continuance of the first-mentioned term and demise, and of the demise to the plaintiff, to wit, on the day and year last aforesaid, a large sum of money, to wit, the sum of 4*l.* 16*s.*, of the rent aforesaid, for three periods of four weeks each of the said demise, ending on the day

*177] *and year last aforesaid, became and was due, owing and payable from the plaintiff to the defendant Nibbs, and then, and from thence until and at the said time when, &c., remained and continued due, in arrear, and unpaid: that, just before the said time when &c., and after the day on which the said rent became and was due and payable, and when the same was actually due, in arrear, and unpaid, and during the continuance of both the said demises, and within thirty days next before the said time when, &c., to wit, on the 1st of February, 1846, the plaintiff fraudulently conveyed away and carried off and from the said premises so then held and enjoyed by the plaintiff as such tenant thereof to the defendant Nibbs as aforesaid, the said goods and chattels and effects in the declaration mentioned, being the proper goods and chattels and effects of the plaintiff, to prevent the defendant Nibbs from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid,—the said goods, chattels, and effects being then liable to be distrained for the said arrear; and for that purpose conveyed away and abstracted the said goods and chattels and effects in the declaration mentioned, without leaving any other goods or chattels on the said premises so held by the plaintiff as aforesaid, whereon the defendant Nibbs could or might distrain for such arrear of rent as aforesaid: and that, for that reason, and because the said rent still remained due, in arrear, and unpaid, and because there was no sufficient distress upon the said premises so held by the plaintiff as aforesaid, whereon the defendant Nibbs could distrain for such arrears of rent, the defendant Nibbs, in his own right, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said goods and chattels had been so fraudulently conveyed away and carried off as aforesaid, and during the continuance of both the said demises *178] respectively, to wit, *on the day and year in the declaration mentioned, did take and seize and carry away the said goods and chattels and effects in the declaration mentioned, as a distress for the said arrear of rent, the same then being due, unpaid, and in arrear, and did impound the same as such distress, at a near and convenient place, as the defendant Nibbs lawfully might for the cause aforesaid,—which were the trespasses whereof the plaintiff had above complained against the defendant Nibbs—verification.

The plaintiff joined issue on the first plea; and, as to the second, he new assigned, that he issued his writ, and commenced his said action thereupon, not for the said trespasses in the second plea mentioned, and thereby attempted to be justified; but for that, after the defendant Nibbs had taken, seized, and carried away the said goods, chattels, and effects, as in the second plea was mentioned, and for the purpose in that plea mentioned, and after the plaintiff had paid to the defendant Nibbs, to wit, on the 9th of February, in the year aforesaid, in satisfaction and

discharge of the said arrears of rent in the second plea mentioned, and of the costs and charges of the said distress in that plea mentioned, a large sum of money, to wit, the sum of 4l. 15s., the same being then a sufficient sum to satisfy and discharge the said arrears of rent in the second plea mentioned, together with all the costs and charges of the said distress in that plea mentioned, and after the defendant Nibbs had accepted and received the said sum of money in full satisfaction and discharge of the said arrears of rent in the said second plea mentioned, and of the costs and charges of the said distress in that plea also mentioned, and after the defendant Nibbs ought to have given up and restored to the plaintiff the said goods, chattels, and effects so by the defendant Nibbs seized, taken, and distrained, as in the second plea was mentioned, and after the said 9th of February, in the year *aforesaid*, the defendant Nibbs *retained possession of the said goods, chattels,* [*179 and effects in the declaration and second plea respectively mentioned, for a long space of time, to wit, two days, after the said 9th of February, in the year *aforesaid*; and also, after the said 9th of February, in the year *aforesaid*, *sold and disposed of the said goods, chattels, and effects* in the declaration and second plea respectively mentioned; and that such trespasses above newly assigned were other and different trespasses than and from the said trespasses in the second plea mentioned, and thereby attempted to be justified—verification and prayer of judgment.

To this new assignment the defendant Nibbs demurred specially, showing for causes, amongst others, that the new assignment was a departure from the declaration, inasmuch as the acts of trespass charged in the declaration were only, *seizing, taking, and carrying away*, and the grievances newly assigned were only *retaining possession, selling, and disposing*; that it was doubtful whether the grievances newly assigned were a *seizing, taking, and carrying away*; that an act of trespass is an injury to the *plaintiff's* possession, and that the grievances new assigned clearly implied that the *defendant* had the possession, because the grievance was, that *the defendant retained possession*; and that the grievances newly assigned were not substantive trespasses, but rather grounds for an action of detinue or trover, or on the case.

The plaintiff joined in demurrer.

The argument took place in Hilary term last, before WILDE, C. J., and MAULE, CRESSWELL, and V. WILLIAMS, Js.

Bramwell, in support of the demurrer. The declaration charges a trespass by the two defendants; the new assignment, a trespass by the defendant Nibbs alone: that clearly is a departure—Com. Dig. tit. *Abatement*, *(L. 3). Where a plaintiff shows by his replication, [*180 or other subsequent pleading, that the action is improperly brought, the defendant is entitled to judgment on the declaration. [V. WILLIAMS, J. Does not your special demurrer tie you down to a particular departure?] Departure may be taken advantage of on

general demurrer. [V. WILLIAMS, J. Is that so? The cases cited in 6 N. & M. 607, n. (b), seem to establish the contrary.] When the subsequent pleading shows that the action is not maintainable at all, that is clearly available on general demurrer. With respect to the species of departure that is pointed out as a ground of special demurrer—The declaration charges the defendants with having *seized, taken, and carried away* certain goods of the plaintiff; and the new assignment alleges that the defendant Nibbs *retained possession of the goods so seized, taken, and distrained, for two days, and sold and disposed of them.* The detention of the goods was not a trespass; it was a mere breach of the agreement between the parties. [WILDE, C. J. In *Evans v. Elliott*, 6 N. & M. 606, it was held that replevin lay, at common law, for a wrongful *detention* of goods taken under a lawful distress.] Here, the goods were in the custody of the law, and therefore could not be the subject of a trespass. *Gulliver v. Cosens*, 1 Man. Gr. & S. 788, is a distinct authority to show that trespass will not lie under the circumstances alleged on this record. If trespass *were* maintainable, money had and received might have been maintained. [WILDE, C. J. That does not follow.] The plea shows that 4*l.* 16*s.* rent was in arrear; the new assignment states that the plaintiff paid, and Nibbs accepted, 4*l.* 15*s.*, after the seizure, in satisfaction and discharge of the rent and the expenses. If Nibbs had a right to distrain, he had a right to continue the distress until payment of the entire rent.

*181] **Douling*, Serjt., *contra*. The new assignment is no departure: in tort, each defendant is liable for the whole, and may be found guilty, though others are acquitted; consequently, the defendant Nibbs having thought fit to sever in pleading, the new assignment, showing a trespass by him alone, is a good continuance of the declaration. In *Griffin v. Scott*, 2 Ld. Raym. 1424, 2 Str. 7, 1 Barnard. B. R. 3, it was held, that, unless in cases where a distrainer is authorized by statute to keep the distress on the premises upon which he has distrained, he is liable to an action of trespass if he suffers them to remain there an unreasonable time. In *Winterbourne v. Morgan*, 11 East, 395, where one who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress,—it was held that he was, at any rate, liable in trespass *quare clausum fregit* for continuing on the premises, and disturbing the plaintiff in the possession of the house, after the time allowed by law. Lord ELLENBOROUGH there intimated a doubt “whether the mere act of remaining in possession of the goods on the premises after the time allowed by law, if the same had not been accompanied or followed by the act of removing them, must not have been referred to the original lawful entry by the operation of the statute, and thereby have assimilated the case to that of one who enters by leave of the

owner, and does not quit at the time, or after the purpose satisfied, to which his leave extended; who, according to the doctrine discussed in the *Six Carpenters' case*, 8 Co. Rep. 146, is not, by merely not doing what he should, a trespasser." But, LE BLANC, J., and BAYLEY, J., were of opinion that trespass was the proper remedy against a person who *has made a distress continuing upon the premises after the time allowed by law. And in *Ladd v. Thomas*, 12 Ad. & E. [*182 117, Lord DENMAN observes: "I must say I think continuing in possession after a proper tender, is ground for an action of trespass, that Lord ELLENBOROUGH's doubts on that subject in *Winterbourne v. Morgan* were not well founded, and that LE BLANC, J., and BAYLEY, J., took a right view of it." This view is also strongly fortified by the case of *Evans v. Elliott*. Here, the new assignment admits that rent was due, and that the original seizure was lawful; but states that the defendant retained the goods and sold them after the arrears of rent and the expenses had been fully paid and satisfied: and these facts are admitted by the demurrer. [WILDE, C. J. How does the 2d resolution in the *Six Carpenters' case* square with the cases that have held the subsequent continuing in possession to be ground for an action of trespass?] The sale here was a substantive trespass, and could have no relation to the original taking. The main question in *Gulliver v. Cosens* was as to the form of the action: it was, in effect, a review of the case of *Lindon v. Hooper*, Cowp. 414. The objection as to the amount paid in satisfaction of the rent and expenses, is without foundation, both sums being laid under a *videlicet*.

Bramwell, in reply. *Turner v. Ford*, 15 M. & W. 212, is an authority to show, that, the moment the goods ceased to be in the custody of the law, the right of possession reverted to the party in whom was the right of property. [WILDE, C. J. The property in the goods was not changed by the distress: *Moor v. Pyrke*, 11 East, 52.] The plaintiff may plead in bar to an avowry for rent reserved, nothing in arrear for part of the rent, and tender of the residue.(a) So, *in bar to an avowry [*183 for damage-feasant, he may plead tender of amends.(b) But no authority is to be found, that a plea of payment or tender of the rent after an impounding, would be an answer in an action of replevin. In *Anscomb v. Shore*, 1 Campb. 285, S. C. 1 Taunt. 261, Sir JAMES MANSFIELD says, that, "after the cattle were impounded, and in the custody of the law, there could be no tort on the part of the defendant in detaining them." The new assignment, showing that the real ground of complaint is the alleged trespass by Nibbs alone, is clearly a departure in matter of substance. There is no suggestion that the other defendant was party to that trespass.

WILDE, C. J. The case of *Evans v. Elliott* appears to us to conflict

(a) Com. Dig. tit. *Pleader*, (3 K. 20).

(b) Com. Dig. tit. *Pleader*, (3 K. 23).

with the general principles laid down by Lord Coke in the *Six Carpenters' case*—"that tender upon the land *before the distress*, makes the distress tortious; tender *after the distress*, and *before the impounding*, makes the detainer, and not the taking, wrongful: tender *after the impounding* makes neither the one nor the other wrongful; for, then it comes too late, because then the cause is put to the trial of the law, to be there determined. But, after the law has determined it, and the avowant has return irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after, or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods." I feel considerable difficulty in coming to the conclusion that a mere non-feasance can be the subject of an action of trespass. It is important, however, to consider the true effect of the decision in *Evans v. Elliott*. (a) My present impression certainly is, that *184] trespass will not lie for the mere retention of the goods: the goods being in the custody of the law, the distrainer is under no legal obligation actively to re-deliver them; the owner must take due means to re-possess himself of them. There is little difficulty as to the substantial justice of this case. That trover or detinue would lie, there is no doubt: the only question for us to consider, is, whether trespass will lie. In *Vertue v. Beasley*, 2 M. & Rob. 21, a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed: the landlord refused to accept it, and afterwards removed the goods; and PARKE, J., ruled that trespass was maintainable for such removal. "If," says the learned judge, "the injury had arisen from a mere neglect to do some act—(which, perhaps, may be read, the mere omission to restore the goods after acceptance of the rent)—case would have been the only proper remedy."

V. WILLIAMS, J. As to the effect of the new assignment, the court are agreed. It must be borne in mind that the proper office of a new assignment is, to explain that which is left ambiguous on the face of the declaration. Here, the declaration charges a joint trespass by Nibbs and Windley, in seizing and disposing of the plaintiff's goods. Windley pleads not guilty only. Nibbs, in effect, says—"I suppose the trespass you, the plaintiff, mean to charge me with, is, that I took your goods as a distress for rent; and that I justify." The plaintiff, by his new assignment, replies—"That is not the trespass I mean, but a totally different one, namely, that you, Nibbs, retained the goods, and sold them, after I had satisfied the arrears of rent, and the expenses of the distress." It may be that the plaintiff has, by his course of pleading, hampered himself, by tying himself down to prove a joint trespass by *185] the two defendants: but, as at present advised, I do not think the new assignment is objectionable on the score of departure.

(a) *Evans v. Elliott* was an action of replevin, a proceeding in rem. And see 6 N. & M. 612 (a), 615 (d), 617 (a), 1 M. & G. 245 (a), 577 (b).

The court are unanimous in thinking that the averment—that all the rent due was satisfied,—is sufficient.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This is an action of trespass, in which the declaration charges the defendants with seizing, taking, and carrying away certain goods of the plaintiff, and converting and disposing of the same to their own use.

The defendant Nibbs pleaded, separately—first, that the goods were not the plaintiff's goods—secondly, that he had demised a house to the plaintiff, at a certain rent; that a certain amount of such rent was in arrear; and that the plaintiff fraudulently removed the goods in the declaration mentioned, from the demised premises, to prevent a distress for such arrears; whereupon, there being no sufficient distress on the demised premises, the defendant Nibbs, took, seized, and carried away the said goods, as a distress for the said arrears, and impounded the same at a near and convenient place.

As to the first plea, the plaintiff has joined issue. As to the second, he has now assigned, that he brought his action, not for the trespasses mentioned in the second plea, but for that, after the defendant Nibbs had taken, seized, and carried away the goods, as in the second plea mentioned, and for the purpose therein mentioned, and after the plaintiff had paid the defendant Nibbs, to wit, on the 9th of February, in the year aforesaid,—in satisfaction and discharge of the said arrears, and of the costs of the said distress,—a certain sum, which was sufficient to satisfy and discharge the said arrears *and costs, and after the defendant Nibbs had accepted and received the said sum in full [*186 satisfaction and discharge of the said arrears and costs, and after the defendant Nibbs ought to have given up and restored to the plaintiff the said goods so taken and distrained as in the said second plea mentioned, and after the said 9th of February, the defendant Nibbs retained possession of the said goods for a long time, to wit, two days, after the said 9th of February, and also, after the said 9th of February, sold and disposed of the said goods.

To this new assignment the defendant Nibbs has demurred.

In support of this demurrer, several objections to the new assignment were urged on the argument; and, amongst them, one which we think well founded, viz., that the grievances newly assigned, do not constitute any ground for an action of trespass.

The new assignment alleges that the payment and acceptance of the rent in arrear, took place after the distress; but it does not aver that it took place before the impounding of the goods distrained: and we think that it must, therefore, be considered to have taken place afterwards. The question, then, is, whether, if a landlord, after a lawful distress and impounding, accepts the rent in arrear, and the charges of the distress, he is liable as a trespasser, for merely retaining possession of the goods distrained, and selling and disposing of them.

As to the selling and disposing of them, although, under certain circumstances, the assuming a right to dispose of the goods of another may amount to a conversion of them sufficient to sustain an action of *trover*; yet it seems to us impossible to maintain that a man becomes a trespasser by the mere act of selling and disposing of the goods of another without authority, unless such sale and disposition be accompanied by *some act of removal of the goods, either by the vendor or by
 *187] the vendee.

It remains, therefore, to consider only whether the merely retaining possession of the goods as alleged, amounts to an act of trespass. In the *Six Carpenters' case*, 8 Co. Rep. 146 b, it was resolved *per totam curiam*, "that, *not doing* cannot make a party a trespasser *ab initio*; because *not doing is no trespass*: and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this *not-doing* cannot make him a trespasser *ab initio*." If, then, a landlord, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feasance, in failing to deliver up the distress, he being required so to do; it appears to us to follow, that a landlord, who has accepted the rent in arrear, &c., after the impounding, cannot be treated as a trespasser, merely because he retains possession of the goods distrained,—although his refusal to deliver them up to the tenant may amount to a conversion sufficient to make the landlord liable in an action of *trover*. The case of *Evans v. Elliot*, 5 Ad. & E. 142, 6 N. & M. 606, was relied on in the argument by the counsel for the plaintiff. But, although that case is an authority for the proposition, that, where there has been a tender between the taking and the impounding, a detention after the tender is sufficient to satisfy the usual allegation in a declaration in *replevin*, that the defendant took, &c., and detained, &c., yet we do not consider that case as deciding that the mere retaining by the landlord of the goods distrained, after the tenant has gained a right to have them delivered up to him, will render the landlord liable to an
 *188] action of *trespass*. Nor do we consider our present *decision as conflicting with the case of *Vertue v. Beasley*, 1 M. & Rob.

21. There, a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed: the landlord refused to accept it, and afterwards removed the goods: and it was held, by PARKER, J., that he was liable to the tenant, in trespass, for such removal. In that case, the cause of action was, not the mere retaining possession, but the wrongful removal of the goods after the tender.

On the whole, we think the demurrer sustainable, on the ground that the new assignment does not sufficiently allege any act of trespass. It therefore has become unnecessary to decide on the other grounds taken during the argument in support of the demurrer.

Judgment for the defendant.

DOE d. PHILLIPS v. ROLLINGS. Feb. 15.

A lease for years not warranted either at common law, or by 32 H. 8, c. 28, was made by A., tenant in tail, to B. After A.'s death, C., the next entail in remainder, demanded the arrears of rent accruing in C.'s time. After some negotiation, B. refused to pay the arrears to C., alleging that D., and not C., was entitled to the estate-tail:—*Held*, that no tenancy was created between C. and B., and that C. might maintain ejectment against B. without notice to quit or demand of possession,—that the setting up of the title of D. amounted to a disclaimer of the title of C.;—and that, for the purposes of the action of ejectment, the entry confessed in the consent-rule was sufficient to determine the lawful possession of B.

EJECTMENT, for messuages and lands in the county of Radnor. The cause came on for trial at the Presteign summer assizes, 1845, when a verdict was taken for the plaintiff, subject to the opinion of this court upon a case to be stated by a barrister.

The facts stated in the case relevant to the questions submitted to the court, were—that Thomas Phillips was *entitled to the premises [189 in question, as tenant in tail in remainder, under the limitations of certain deeds of settlement,—that on the 4th of January, 1844, the said Thomas Phillips, by an agreement in writing, not under seal, demised the premises sought to be recovered, to the defendant for a term of three years, which expired on the 2d of the present month of February—that the said Thomas Phillips died on the 3d of August, 1844,—and that no notice to quit had been given on behalf of the lessor of the plaintiff, before the commencement of the present ejectment.

The day of the demise in the declaration was the 21st of May, 1845.

In September, 1844, the lessor of the plaintiff, and his attorney, informed the defendant that the lessor of the plaintiff claimed, as tenant in tail under a deed of settlement, the greatest part of the farm in the occupation of the defendant, and that the lessor of the plaintiff would expect the defendant to pay him whatever proportion of the rent he was entitled to; and the defendant said that he was willing to do so, and that he would go to the lessor of the plaintiff after the first half-year's rent should become due. The defendant did not go to the lessor of the plaintiff; whereupon the lessor of the plaintiff's attorney, on the 7th of March, 1845, wrote to the defendant, stating that the lessor of the plaintiff was entitled, as heir-at-law, to eighty-eight acres of land, rented by the defendant of the late Thomas Phillips, and requesting the defendant to call upon him, the attorney, on or before the then next Thursday, in order to attorn to Mr. Phillips, and to agree as to the rent to be paid. The defendant called upon the attorney, and said it was not usual to pay rent due on the 2d of February until after hay-fair day, which was the 17th of May. The defendant and the attorney met on the 19th of May, when the defendant said that Mr. Phillips's brother claimed the property, and that he would not pay the *lessor of the plaintiff [190 any rent, but would place it in the bank, and afterwards pay

it to the person entitled to it. After this conversation this ejectment was brought.

The attorney (who proved these facts) stated, that it was agreed that he was to ascertain the amount of the rent due to the lessor of the plaintiff, and that he might have said that the lessor of the plaintiff claimed as *heir-at-law*.

Channell, Serjt., for the plaintiff. Assuming that Thomas Phillips was tenant in tail of the premises in question, under the deeds referred to in the case,—which will hardly be denied by the other side,—the agreement in writing made by him with the defendant of the 4th of January, 1844, even if it amounted to a demise, was clearly either void or voidable by those in reversion or remainder, the provisions of the 32 H. 8, c. 28, which requires a lease by writing indented under seal, not having been complied with. Secondly, if such lease was voidable only, it was sufficiently avoided by the bringing of the present ejectment on the demise of the succeeding tenant in tail. Thirdly, supposing the writing of the 4th of January, 1844, not to amount to a lease, and that a tenancy from year to year was thereby created, there has been a disclaimer on the part of the defendant, which entitles the lessor of the plaintiff to enter, or to bring this action, without giving any notice to quit, and without making a demand of possession.

First, the agreement or lease of the 4th of January, 1844, is void as against the lessor of the plaintiff, not being under seal. It is laid down in Co. Litt. 45 b, that “Leases for lives or years are of three natures: some be good in law; some be voidable by entry, and some void without entry. * * * Voidable, some by the common law, after the death of the lessor, as of tenant in tail, a bishop, &c., or after the death of the *191] husband *(intended of leases not warranted by the said statute of 32 H. 8.) * * * Some void *in futuro*, and some void *in presenti*. *In futuro*, as, if a tenant in tail make a lease for years, and die without issue, it is void as to them in reversion or remainder, though it be made according to the said statute.”

So, in Cruise’s Dig., 4th edition, p. 70, it is said, referring to the foregoing passage, “With respect to leases made by tenants in tail, conformable to the statute 32 H. 8, though binding on the issue, they are void as against the persons in remainder and reversion; so that no acceptance of rent by them will operate as a confirmation. As to leases not conformable to the statute 32 H. 8, they are of course void as to the remainderman or reversioner.” Here, the lease was void from its commencement; and there has been, and could have been, no confirmation of it. It is apprehended that *sealing* was requisite, both as against the issue in tail, and those in reversion and remainder.

Assuming the agreement in question to amount to a lease voidable only and not absolutely void, there are no circumstances in the case which entitle the defendant to notice to quit; and, even if such circum-

stances could be supposed to exist, there has been a disclaimer of the title of the lessor of the plaintiff by the defendant, which renders any such notice unnecessary. In order to create a disclaimer, it is not requisite that a tenant should act *mala fide*, or claim the property himself; it is sufficient if he refuses to pay rent to the owner of the property. *Doe dem. Calvert v. Frowd*, 4 Bingh. 457, 1 M. & P. 480, (a) is expressly in point, and shows that what passed here between the parties, clearly amounted to a disclaimer.

**Talfourd*, Serjt., for the defendant. There can be no doubt that the document of the 4th of January, 1844, supposing it to [192 have proceeded from a person having power to create the interest which that instrument purports to grant, amounted to a lease. It must be admitted that it is not a good lease under the provisions of the 32 H. 8, c. 28, but it is contended that it is not void, but only voidable, and that it has not been avoided by simply bringing the present ejectment. [WILDE, C. J. Here, the demise is laid *after* the entry admitted in the consent-rule. (b) MAULE, J. The entry admitted in the consent-rule must be taken with all its consequences. If this lease was voidable only, so as to require an entry to avoid it, there was such an entry.] The lessor of the plaintiff, instead of endeavouring to avoid the lease, has sought to confirm it—he never asks for possession, but requires the defendant to attorn to him as tenant. [WILDE, C. J. He seems to have assumed the existence of a tenancy, and demanded rent.] He does not tell the tenant for what portion of the land the rent is demanded. With respect to the question of disclaimer, supposing this to be a lease, no disclaimer by words could defeat it. *Doe dem. Graves v. Wells*, 10 A. & E. 427, 2 P. & D. 896. [MAULE, J. A disclaimer dispenses with a notice to quit, in the case of a tenant from year to year, who is *otherwise entitled to such a notice. Where a [193 term of years is vested in a party, it is contrary to the statute of frauds to allow the term to be divested out of him by matter of parol.] Here, the lessor of the plaintiff, by treating the defendant as his tenant, confirmed the lease. [WILDE, C. J. Will an *application* to attorn, not acceded to, have that effect?] It is submitted that the application was, substantially, acceded to by the tenant. In *Denn d. Brune, Clerk, v. Rawlins*, 10 East, 261, it was held, that a tenant in

(a) *Quere*, whether a notice to quit is not dispensed with wherever the tenant sets up a title, which, if it really existed, would render the notice inoperative and nugatory; as, where a tenant from year to year asserts that he holds for life, or for a term certain.

(b) A., entitled to determine the estate of C. in certain land by entry, may enter and demise for years to B., who will thereupon have an *interesse termini*, which B. may convert, by entry, into an actual term; but, instead of taking this course, A. may, without entering, demise to B., and the subsequent entry of B. will have the double effect of divesting the estate of C. and of vesting a term in B. So, here, the entry of John Doe, though subsequent to the demise to him laid in the declaration, and confessed by the consent-rule, is as potent to defeat the estate of the defendant as an entry by the lessor of the plaintiff preceding the demise to John Doe would have been; and the demise may for all practical purposes be considered,—as it is here treated,—as a demise *after* the entry.

tail, having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession, under a void lease, granted by a tenant for life who was the donee of a power, the rack-rent value of the land being 30*l.* a year, could not maintain an ejectment laying his demise on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession, either in the relation of tenant, or at least as continuing by sufferance till notice. It is conceived that the principle of that case applies to the present. At what time can it be said that the defendant was a trespasser before the bringing of the ejectment? No case can be cited wherein the declaration states the demise to be subsequent to its delivery.^(a) Here, the lessor clearly recognises the defendant as a party lawfully in possession, down to the last moment. If, instead of bringing an ejectment, the lessor of the plaintiff had sued in trespass, a plea of leave and license could have been supported. [WILDE, C. J. The record is dated the 21st of May, the demise is on the same day, and the last interview between the parties was on the 19th.]

*194] *Assuming that there was a tenancy from year to year, no disclaimer took place; for, the tenant could not safely pay rent until the exact proportion to which the lessor of the plaintiff was entitled, in respect of the eighty-eight acres, had been ascertained. Upon this point the learned serjeant cited *Doe d. Gray v. Stanion*, Tyrwh. & Gr. 1065, 1 M. & W. 695; *Doe d. Dillon v. Parker*, Gow, N. P. C. 180; and *Doe d. Williams v. Cooper*, 1 M. & G. 135, 1 Scott, N. R. 36.

Channell, Serjt., was heard in reply.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

In this case the ejectment is brought to recover possession of certain farms and lands situate in the county of Radnor, in the principality of Wales, in the occupation of the defendant. The ejectment came on to be tried in August, 1845, at the summer assizes then held at Presteign, in and for the county of Radnor, when a verdict was found for the plaintiff, by consent of the parties, subject to an order of nisi prius, by which it was referred to a barrister, to state a case for the opinion of this court, and to state, among other things, what estate and interest was conveyed by certain deeds of settlement therein particularly mentioned; and the cause comes before the court upon the special case stated by the referee under the authority of the order of nisi prius.

The case states a number of deeds connected with the title under which the lessor of the plaintiff claims, and many facts connected with *195] questions which existed *between the parties at the time of the reference, to which it will not be necessary to advert for the

(a) The time of the delivery of the declaration does not appear, except as it may be inferred from the term of which the declaration is intitled. The declaration against the casual ejector, served on the tenant in possession, is *frequently* intitled of a term *anterior* to the demise laid: the declaration contained in the issue upon which the trial proceeds is *always* entitled as of a term *subsequent* to the demise.

purpose of the judgment of the court, inasmuch as, upon the argument, the *general* title of the lessor of the plaintiff was admitted, and the questions submitted to the judgment of the court were quite independent of the matters referred to, and were brought within a very narrow compass.

It was admitted, upon the argument, that the lessor of the plaintiff was tenant in tail under the limitations of certain deeds of settlement, and that he was entitled to recover in this action, unless the defendant could establish a valid defence upon the objections specifically submitted to the court.

After stating the facts relevant to the questions before the court, (a) his lordship proceeded:—

Upon these facts, it was admitted, on behalf of the defendant, that the lease granted by Thomas Phillips, the last tenant in tail, was not in conformity to the statute, or valid as against the lessor of the plaintiff. But it was said that the lease was voidable only, and that an actual entry was necessary to avoid such lease, before the day of the demise in the declaration. It was further contended, that, by the communication set forth in the case, a tenancy had been created between the lessor of the plaintiff and the defendant, which it was necessary to determine by a notice to quit, before the lessor of the plaintiff could recover the possession.

For the plaintiff, it was insisted—first, that the lease under which the defendant claimed, was void, and required no entry to vest the right of possession in the lessor of the plaintiff—secondly, that the confession of entry in the consent-rule was conclusive evidence of a sufficient entry, if any were necessary to entitle the *plaintiff to recover—thirdly, [*196 it was insisted for the plaintiff that no tenancy had been created between his lessor and the defendant—fourthly, for the plaintiff it was contended, that, if any tenancy was created, the conduct of the defendant amounted to a disclaimer to hold as tenant to the lessor of the plaintiff, and therefore determined the tenancy.

The title of the lessor of the plaintiff being admitted, as before stated, it is only necessary to consider the objections opposed to his recovery of possession.

The first objection is, that the lease by the tenant in tail is not void, but voidable only. The authority cited for the proposition was Co. Litt. 45 b. Whether the whole passage really establishes the proposition for which it is cited, may be open to some doubt, as applied to the present case; but it is not material to be considered, as it was admitted, that, at all events, the lease would be avoided by entry: and if, therefore, a sufficient entry has been made, the question whether the lease is void or voidable, becomes immaterial.

It has become common learning, that an actual entry is only now necessary in one case, and that is, to avoid a fine with proclama-

(a) *Supra*, pp. 188, 189.

tions; and the only ground upon which it is held to be necessary in that case is, the supposed stringency of the express words of the statute of fines, 4 H. 7, c. 24. By that statute, it is enacted, "that, after the engrossing of every fine to be levied, &c., of any lands, &c., the same fine be openly and solemnly read and proclaimed in the same court, the same term, and in three terms then next following the same engrossing in the same court, on four several days in every term, &c., and, the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women coverts, (other than been parties to the said fine,) and every person then being *197] within the age of twenty-one *years, in prison, or out of the realm, or not of whole mind, at the time of the said fine levied, not parties to such fine; and saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest, as they have to or in the said lands, &c., the time of such fine engrossed; so that they pursue their title, claim, or interest by way of action, or lawful entry, within five years next after the said proclamations had and made; and also saving to all other persons such action, right, title, claim, and interest in or to the said lands, &c., as first shall grow, remain, or descend, or come to them after the said fine engrossed and proclamation made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied, so that they take their action, or pursue their said right and title, according to the law, within five years next after such action, right, title, claim, or interest, to them accrued, descended, remained, fallen, or come."

In all other cases where entry is necessary to vest the possession, or right of possession, proof of actual entry is not necessary; but the confession in the consent-rule is deemed to be sufficient evidence that the required entry was made.^(a) The authorities to this effect abound. In *Oates d. Wigfall v. Brydon*, 3 Burr. 1895, a question arose as to the effect of the consent-rule as proof of an ouster by one tenant in common, of another. Lord MANSFIELD, after stating that the meaning of confessing lease, entry, and ouster, was, to bring the matter to the mere question of the plaintiff's possessory title, said, that actual entry was held necessary to avoid a fine, from the words of the statute, as the word "action" could not mean "ejectment."^(b) In all other cases, the *198] confession of lease, entry, and ouster is sufficient; and *so it is now settled that it is sufficient for an ejectment brought for a condition broken. In *Jenkins d. Harris v. Prichard*, 2 Wils. 45, a fine had been levied, and the court adjudged an actual entry not to be necessary to be made, in order to avoid a fine at common law, as that was, being without proclamations. In *Goodright d. Hare v. Cator*, 2 Doug.

(a) Vide *supra*, 192 (a).

(b) The context showing that a real action was contemplated.

477, a question arose whether an entry was necessary to sustain the ejectment, which was brought to recover possession upon condition broken by non-payment of rent. Lord MANSFIELD said: "We have looked very particularly into the cases for two hundred years back; and we find great contrariety of opinion, whether an actual entry is necessary to maintain an ejectment on a clause of re-entry for non-payment of rent: but, in the most distant period, the better opinion has been that it is not. This was Lord HALE's opinion, and is mentioned as such, and as that of L. C. J. SCROGGS, by Lord HOLT, in *Little v. Heaton*, 1 Salk. 259, 2 Ld. Raym. 750. But we look upon it as having been fully settled, in 1703, by the opinion of all the judges, upon deliberation and consideration of all the cases, that an actual entry is *only* necessary to avoid a fine. And so the practice has been ever since. The reason of the thing is agreeable to the practice; for, it is absurd to entangle men's rights in nets of form without meaning; and, an ejectment being a mere creature of the court, passed for the purpose of bringing the right to an examination, an actual entry can be of no service. In the case of fines, it is required by a positive rule of law, and clearly necessary under the statute 4 Ann. c. 16." In *Doe d. Duckett v. Watts*, 9 East, 17, a fine had been levied, but, before the proclamations had been made, an ejectment was brought; and it was insisted that the plaintiff could not recover, *for want of entry before the ejectment. The court refused a rule nisi, upon the ground of misdirection in [*199 ruling that the confession-rule rendered proof of actual entry unnecessary. Lord ELLENBOROUGH said: "The statute of 4 H. 7 makes a fine with proclamations a bar, saving the rights of persons who pursue them by action or lawful entry within a certain time. In *Oates d. Wigfall v. Brydon*, Lord MANSFIELD said that the confession of lease, entry, and ouster was sufficient in all cases, except in the case of a fine *with proclamations*, in which case it was necessary to prove an actual entry." In the note to *Doe d. Duckett v. Watts*, it is said; "Lord COKE seems to consider the statute 18 Ed. 1, as repealed by the 4 H. 7, c. 24, so far as to render an entry of the party's claim at the foot of the fine unavailable at this day. Certainly it must be unavailable against a fine levied with proclamations according to the latter statute. And, since the statute 21 Jac. 1, c. 16, the party having a right of entry has twenty years within which to make his entry after his right accrues: but, by the statute 4 Ann. c. 16, s. 16, no claim or entry on lands shall be of any force or effect to avoid any fine levied *with proclamations*, or shall be a sufficient entry or claim *within the statute of Jac. 1*, unless an action shall be thereupon commenced within one year after, &c., and prosecuted with effect. Upon the whole, it seems now, that, for every purpose, except that of avoiding a fine *with proclamations*,—in which case the statute of H. 7 requires an *entry*,—the bringing of an ejectment will serve the same purpose: and, indeed, if the good sense of the thing

is to be regarded, it seems better adapted to answer any useful purpose for which an actual entry on the land was originally required, or can at this day be made." See also the notes to *Duppa v. Mayo*, 1 Wms. Saund. 287, n. (16).

*200] *Even if any question could now be made, whether an entry is necessary to avoid a fine at common law, it seems perfectly clear, that, in all other cases where entry is necessary, the confession in the rule is sufficient evidence of the fact of such entry. We, therefore, think there is no objection to the plaintiff's recovery, upon the ground that he has not proved a sufficient entry; if, indeed, entry was necessary.

Upon the objection urged, that an undetermined tenancy existed on the day of the demise, we are of opinion that no tenancy was ever created between the parties. The utmost extent of the evidence is, to show a negotiation between the parties with a view to a demise, if the parties could agree, and that such negotiation was determined by the defendant's acts and refusal to pay rent to the lessor of the plaintiff. The negotiation had not advanced to the adjustment of the amount of rent, or any of the other material terms of tenancy. It is plain that the defendant did not consider that he had become tenant to the lessor of the plaintiff; as, if he *had* so become, he could have had no pretence for refusing to pay the lessor of the plaintiff any rent, upon the ground of an adverse claim, which he peremptorily did: but, if the defendant *did* hold as tenant to the lessor of the plaintiff, by agreement made between them, in that case the setting up an adverse title as a ground for refusing to pay any rent to the plaintiff, was a disclaimer of his then holding as tenant to the plaintiff. In *Doe d. Calvert v. Frowd*, 4 Bingh. 457, 1 M. & P. 480, and most of the other cases where the question of disclaimer has arisen, the parties in possession have not claimed to be tenants under contracts made with the persons asserting a right of entry by force of the disclaimer; but the claim of tenancy by such persons was by operation of law, by virtue of contracts of demise and tenancy made with other persons

*201] *through or under whom the parties claim who insist on the right of possession: but, in this case, the defendant claims to retain possession upon the ground that he has agreed to hold the land as tenant; and, when a person so circumstanced says, as the defendant did, "I will pay you no rent until it is settled who is entitled to the property, and will then pay to the person who shall establish his title thereto,"—we think this must be deemed to be a disclaimer of an existing relation of landlord and tenant, and a putting of the person of whom he now professes to hold as tenant, to the proof of his title; and he cannot, therefore, effectually resist an ejectionment made necessary by his own conduct, in repudiating a title under which he claims to retain possession of the land.

We think that the relation of landlord and tenant never existed between the lessor of the plaintiff and the defendant; and that, if it ever

did exist, it was determined by conduct of the defendant which amounted to a disclaimer of holding the land as tenant of the lessor of the plaintiff.

We, therefore, are of opinion that, the lessor of the plaintiff's title to the land being admitted, the defendant has failed to establish any ground entitling him to retain the possession as against the lessor of the plaintiff. The *postea*, therefore, must be delivered to the plaintiff.

Postea to the plaintiff.

*FRANCIS v. DODSWORTH. Feb. 15.

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Although a discharge under the insolvent debtors act, 1 & 2 Vict. c. 110, does not operate as a complete extinguishment of a debt scheduled, the creditor is not entitled to plead such debt by way of set-off to an action brought against him by the insolvent for a demand accruing subsequently to his discharge.

To debt for 64*l.* 8*s.* 4*d.*, for work and labour, interest, and on an account stated, the defendant pleaded—first, except as to 10*l.*, never indebted—secondly, a set-off of “a sum equal to the amount of all the debts in the declaration mentioned,” &c., except as aforesaid, for work and labour as a surgeon and apothecary, &c. —thirdly, as to 10*l.*, payment into court. The plaintiff joined issue on the first plea, took the 10*l.* out of court, and replied to the second, as to 30*l.* 12*s.* 6*d.*, parcel, &c., that, on, &c., he the plaintiff, then being an insolvent debtor in actual custody, &c., was duly discharged, according to the 1 & 2 Vict. c. 110, of and from the said sum of 30*l.* 12*s.* 6*d.*, and that the said order and discharge still remained in full force, “and that *this the plaintiff was ready to verify*,” and that he the plaintiff never was indebted in the residue of the money alleged in the second plea to be due from him to the plaintiff, *concluding to the country*.—

Held, that the replication was bad on special demurrer, for not setting out the several matters necessary to show that the plaintiff was entitled to his discharge under the statute, or that he had duly complied with its requisitions.

Whether the double conclusion was good, or whether the whole ought to have concluded to the court, *quære*.

Quære, as to the right of a defendant to demur to part of an entire replication, and to join issue upon the residue.

DEBT, for 64*l.* 8*s.* 4*d.*—27*l.* 4*s.* 2*d.*, for the price and value of work done and materials for the same provided by the plaintiff for the defendant, at his request; 5*l.* for interest; and 32*l.* 4*s.* 2*d.* for money found due upon an account stated.

The defendant pleaded—first, as to the debts in the declaration mentioned, and all damages sustained by the plaintiff by reason of the non-payment thereof, except as to so much of the debts and causes of action in the declaration mentioned as related to the sum of 10*l.*, parcel of the moneys in the declaration mentioned, and all damages by the plaintiff sustained by reason of the non-payment of the said sum of 10*l.*, parcel, &c. never indebted;—secondly, as to the debts in the declaration mentioned, and all damages sustained by the plaintiff by reason of the non-payment thereof, except as in the introductory *part of the first plea was excepted, that the plaintiff, before and at the time of the commencement of this suit was, and still is, indebted to the defendant in a large sum of money, to wit, a sum of money equal to the

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amount of all the debts in the declaration mentioned, and all damages sustained by the plaintiff by reason of the non-payment thereof, except as aforesaid, for the work and labour, care, diligence, journeys, and attendance of the defendant done, performed, and bestowed as a surgeon and apothecary, for the plaintiff, and at his request, and for divers medicines and other necessary things before that time found and provided, administered, delivered, and applied by the defendant for the plaintiff, and at his like request; and for other work done, and materials for the same provided, by the defendant for the plaintiff, at his request; and for goods sold and delivered by the defendant to the plaintiff, at his request; and for money due and owing from the plaintiff to the defendant on an account then stated between them; which sum of money so due and owing from the plaintiff to the defendant as aforesaid equals the amount of the debts in the declaration mentioned, and all damages sustained by the plaintiff by reason of the non-payment thereof, except as aforesaid, and out of which sum of money so due and owing from the plaintiff to the defendant, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiff the full amount of the said debts and damages, except as aforesaid, according to the form of the statute in such case made and provided; verification;—thirdly, as to the residue of the debts and causes of action so excepted in the introductory part of the said first and second pleas as aforesaid, payment in to court of 10*l.* and (a) never indebted *ultra* that sum.

*204] The plaintiff joined issue on the first plea, took out of *court the 10*l.*, and replied to the second plea as follows:—"And, as to the second plea of the defendant, the plaintiff says, that, after the sum of 30*l.* 12*s.* 6*d.*, parcel of the sum of money stated in the second plea of the defendant to be due and owing from the plaintiff to the defendant had become due and owing from the plaintiff to the defendant, to wit, on the 31st of March, 1843, by a certain order then made by the court for the relief of insolvent debtors, held at, &c., the plaintiff, then being an insolvent debtor in actual custody, and a prisoner in the debtor's prison for London and Middlesex, in the city of London, was duly discharged, according to a certain act of parliament made and passed in a certain session of parliament holden in the first and second years of the reign of the now queen, (b) 'for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England,' of and from the said sum of 30*l.* 12*s.* 6*d.*, parcel, &c.; *with this*, that the said order and discharge still remain in full force; and this the plaintiff is ready to verify; and that he the plaintiff never was indebted to the defendant in the residue of the sum of money stated in the second plea of the defend-

(a) This latter negative is merely a repetition of the first plea.

(b) 1 & 2 Vict. c. 110.

ant, to be due and owing from the plaintiff to the defendant, in manner and form as the defendant has in his said second plea in that behalf alleged;" concluding to the country.

To this replication the defendant rejoined by demurring specially to the first part, (a) assigning for *causes of demurrer, that the gist and substance of the second plea is, the allegation that a certain sum due and owing from the plaintiff to the defendant equals the amount of the moneys due from the defendant to the plaintiff, as alleged in the declaration, whereas *the said part of* the said replication does neither traverse the said allegation nor confess and avoid the same, and *the said part of* the said replication is an argumentative manner of putting in issue the fact whether the sum in the said second plea mentioned does or does not equal the moneys in the declaration mentioned, and that it is quite consistent with the truth of *the said part of* the said replication, that the remaining part of the sum in the said plea alleged to be due from the plaintiff to the defendant, after deducting the said sum of 30*l.* 12*s.* 6*d.*, parcel, &c., equals the debts and damages in the declaration mentioned; (b) that the defendant, in his said second plea, does not aver that the sum due from the plaintiff to the defendant does not exceed the debts and damages in the declaration mentioned, or that it is equal to such debts and damages and no more, but offers to allow the amount due to the plaintiff out of the said sum which is alleged to be equal in amount, and may be, consistently with the said second plea, much more than equal, to the debts and damages in the declaration mentioned; that the plaintiff ought to have replied in one entire replication to the said second plea, and not to have divided the said second plea into separate parts, in order to answer each of the parts separately; (c) that *the said part of* the replication tenders immaterial issues, inasmuch as the plaintiff may succeed on either of such issues, and yet *may be indebted to the defendant in a sum equal to the debts and damages in the declaration mentioned; (c) that the plaintiff, in *the said part of* the replication, has not averred that he never was indebted in any sum, which, together with the said sum of 30*l.* 12*s.* 6*d.*, equals the debts and causes of action in the declaration mentioned; (c) that the plaintiff has not, in *the said part of* his said replication, shown how or in what manner the plaintiff was discharged from the said sum of 30*l.* 12*s.* 6*d.*, or that the plaintiff was in any manner entitled to relief under or by virtue of the said act of parliament, or that the plain-

(a) The defendant had originally demurred to the whole replication, and had also joined issue upon that part of the replication which concluded to the country; but afterwards was allowed to amend his rejoinder by confining his demurrer to that part of the replication upon which he did not take issue. The additions in italics were thereupon introduced. Vide post, 224, n. (b).

(b) It is quite consistent with the truth of *the said part of* the said replication, but it does not appear to be consistent with the *whole* replication.

(c) This objection, though retained in the amended rejoinder, is an objection to the entire replication, upon part of which issue is joined.

tiff had in any manner complied with the provisions of the said act, or that the plaintiff had given the proper notices required by the said act, or that the plaintiff had inserted the said sum of 80*l.* 12*s.* 6*d.*, or any sufficient description thereof, or of his said debt due and owing to the defendant, in his schedule as such insolvent debtor; *that the second part of the plaintiff's replication ought to have formed one entire whole with the first part of the replication ;(a) that the plaintiff ought not to have concluded the first part of his replication with a verification, in the manner he has done, without including therein the last part of his said replication ;(a) that the defendant cannot take any proper issue on the replication as now drawn, for, whether an issue taken on the first part of the replication should be found in favour of the plaintiff or defendant, it would not affect the truth of the plea ;(a) that the first part of the replication professes to answer the whole plea, whereas it only in fact answers part of such plea ; and that the said replication is in other respects uncertain, informal, and insufficient.(a)*

To the replication of the plaintiff as to the residue of the sum of money stated in the said second plea to be *due and owing from
 *207] the plaintiff to the defendant, and which the plaintiff had prayed might be inquired of by the country, the defendant did the like.

The plaintiff joined in demurrer.

The case was argued in Hilary term last, before WILDE, C. J., and MAULE, CRESSWELL, and V. WILLIAMS, JS.

T. Jones, in support of the demurrer. The replication is bad both in substance and in form. The statute 1 & 2 Vict. c. 110, does not in any way interfere with the right of set-off, or prevent a party sued by an insolvent debtor, from setting off a debt due to him from the insolvent, although he may not be able to enforce his claim against him by action. The 91st section provides that no writ of *f. fa.* or *elegit* shall issue against any person who has become entitled to the benefit of the act. The remedy of set-off, however, is collateral. If one who has taken the benefit of the insolvent act will deal with a former creditor, by giving him credit, he enables him to set up the old debt as an answer to a claim on the new account: and probably this was contemplated and intended by the legislature. In *Phillips v. Sherville*, 6 Q. B. 944, it was held to be no objection to a distress for rent, that the tenant, after the rent had become due, petitioned the insolvent debtors court, under the 1 & 2 Vict. c. 110, inserted the amount thereof in his schedule as a debt, was opposed in respect of it by the landlord, and obtained his discharge. Lord DENMAN, in giving the judgment of the court, there observes: "It was said, upon the argument, that, as the person of the tenant was protected, after his discharge, against all proceedings in respect of debts mentioned in the schedule, and as his future effects

(a) This objection, though retained in the amended rejoinder, is an objection to the entire replication, upon part of which issue is joined. Vide post, 324, n.

were protected from process of execution, except upon the judgment confessed to the provisional *assignee, the remedy by distress was gone also; and that, by the operation of the insolvent debtors act, the debt was, for all purposes of remedy, except under that act, virtually extinguished. That may be so as far as regards the remedy by action, but not as regards the remedy by distress. The rent itself was not extinguished; and the remedy by distress is wholly collateral to the remedy by action. It was decided in *Briggs v. Sowry*, 3 M. & W. 729, and *Newton v. Scott*, 9 M. & W. 434; (a) that the discharge of the person of the tenant under the bankrupt acts, does not take away the right of distress: and upon that part of the case there is a perfect analogy between a discharge under the bankrupt acts and a discharge under the insolvent acts."

The next objection is, that, even if the replication be good in substance, it is bad in point of form. It assumes to use by way of replication, that which the statute only gives by way of plea. The 91st section enacts, "that, if any suit or action shall be brought, &c., against any such person, &c., for any such debt, &c., it shall be lawful for such person, &c., to plead generally that such person was duly discharged, according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially," &c. This replication, to be good, must be good at common law. It should clearly show the jurisdiction of the insolvent debtors court. This it does not do. For instance, it does not appear that the plaintiff petitioned the court; for, it is quite consistent with all that is stated, that he did not apply to the court by petition. The replication also omits to state a variety of other matters which are essential as conditions *precedent to give that court jurisdiction, and to entitle the party to his discharge. [V. WILLIAMS, J. The replication [*209 does not state that the party was in prison "for or by reason of any debt."]

Another objection taken to the replication, was, that it was not restricted to giving an answer as to the 80*l.* 12*s.* 6*d.*, but professed to answer the whole of the second plea.

Manning, Serjt., *contra*. The effect of the 91st section of the 1 & 2 Vict. c. 110, clearly is, to bar all actions for the recovery of debts in respect of which the debtor has obtained his discharge. The question is, whether the statute meant to leave him still subject to a set-off in respect of the same description of debts. It may be conceded that the remedy by distress is not taken away by the tenant's discharge: but the reason of that is, that the land is a collateral security for the rent. It is clear that *riens in arriere* could not be pleaded; for, if it might be by the tenant, it might be equally so by a stranger. [MAULE, J. There may be a rent-charge, for which no action would lie. Such a debt would

(a) Affirmed, on error, in the Exchequer Chamber, 10 M. & W. 471.

not be barred by a discharge under the insolvent debtors act. Why, then, should a rent better secured,—viz. by the land, and also by the personal liability of the tenant,—be barred?] No doubt, that is so. But the right of *set-off* is strictly analogous to the right of *action*. [MAULE, J. The statute does not say that no action shall be brought in respect of any debt inserted in the schedule, but only, that, if any action shall be brought, it shall be lawful for the insolvent to plead that he was duly discharged according to the act. The statute of limitations, 21 Jac. 1, c. 16, applies to a replication to a set-off as well as to a plea.] The courts allow the statute of limitations to be replied to a plea of set-off, because the 2 G. 2, c. 22, s. 13, speaks of mutual debts.

*210] The set-off is *considered in the nature of a cross-action. [V.

WILLIAMS, J. Lord TENTERDEN seems to have entertained a doubt as to the application of the statute of James to a replication; for, the 9 G. 4, c. 14, s. 4, provides, that the recited acts of 21 Jac. 1, c. 16, and 10 Car. 1, sess. 2, c. 6, (Irish,) and that act, “shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.” The general understanding of the profession, however, undoubtedly is that the statute of limitations does apply to a replication to a plea of set-off.] The 1 & 2 Vict. c. 110, s. 87, provides that the prisoner, before adjudication, shall execute a warrant of attorney to confess judgment for the amount of the debts stated in his schedule; and that, “if at any time it shall appear to the satisfaction of the court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the court may permit execution to be taken out upon such judgment for such sum of money as, under all the circumstances of the case, the said court shall order,” &c. The practice of the commissioners under this section is, so to exercise the discretion vested in them as not to deprive the insolvent of the means of supporting his family. [V. WILLIAMS, J., referred to the case of *Ford v. Dornford*, 15 Law J., N. S., Q. B. 172,(a) where it was held that a discharge under the insolvent act cannot be given in evidence under the replication of *non indebitatus* to a plea of set-off, but must be replied specially; and where PATTERSON, J., says: “In the case of *Chapple v. Durston*, 1 C. & J. 1, the Court of Exchequer treated a plea of set-off as if it had been a cross-declaration; and, if that were so, it is quite clear that the replication would be insufficient, as the case of *Bircham v. Creighton*, 10 Bingh. 11, 3 M. & Scott, 345, is an authority,

*211] if any were *wanting, to show that a discharge under the insolvent act would not be admissible under a plea of *nil debet*, or *nunquam indebitatus*, or *non assumpsit*. Our decision, however, with reference to this principle, on the authority of the above cases, does not go the length of establishing that it is necessary, in replying a dis-

charge under the insolvent act to a plea of set-off, to set out all the proceedings under the insolvent act. On the contrary, if the decision in *Chapple v. Durston* amounts to a decision that a plea of set-off is a cross declaration, then it may be that the replication to such a plea might be in the form which the act gives as the form of a plea to a declaration."

[MAULE, J. My brother PATTESON is not there speaking of a matter of law well established; he is merely giving utterance to a speculative opinion. I incline to think that the replication here should have set up the discharge under the insolvent act as to the 30*l.* 12*s.* 6*d.*, and denied that the residue of the sum mentioned in the plea exceeded the sum demanded, concluding to the court, and not to the country; and that the rejoinder should have traversed either of these allegations,—both being necessary to make the replication a good answer to the plea.] Possibly the replication might have properly concluded with a verification; though *Blakesley v. Smallwood*, 8 Q. B. 538, 15 Law J., N. S., Q. B. 185, seems to be an authority to the contrary. There, a declaration in assumpsit contained counts for goods sold, and on an account stated between the plaintiff and B., and a count on an account stated between the plaintiff and the defendants, as executors of B., assigning a general breach: the defendant pleaded, to the whole declaration, a set-off for money due on an account stated between the plaintiff and B., payable on request, and remaining unpaid to B., and to the defendants, as executors, at the *commencement of the suit: the plaintiff replied, as to parcel of the causes of set-off, the statute of limitations, and, as to the residue, that the plaintiff was not indebted to B., nor is indebted to the defendants as executors, concluding with a verification: and it was held, on special demurrer, that the latter part of the replication was bad, and that it should have concluded to the country. [*212]

The learned serjeant further contended that the replication was not obnoxious to the charge of duplicity, the whole forming but one entire answer to the plea; and that, at all events, all objections thereto that were curable by pleading over, were cured by the issue joined at the conclusion of the rejoinder. Upon the former argument, (a) the court decided that the defendant could not retain his demurrer to the whole replication, in conjunction with an issue taken upon part of the same replication; and directed that he should either confine his demurrer to the first part of the replication, or strike out the issue taken upon the second part of the replication. He has done neither the one nor the other, and the record still exhibits the somewhat unusual spectacle of a demurrer and an issue upon the same matters. It is impossible that there can be judgment for the defendant upon this record. There must be either judgment for the plaintiff, or an award of repleader. He referred to *Parker v. Atfield*, 1 Salk. 312, Sir W. Jones, 91, the note to *Hancock v. Prowd*, 1 Wms. Saund. 333, (7); Comyn's Digest, tit. *Plead-*

(a) Post, 224 (b).

er, (2 D. 9); *Campion v. Bentley*, 1 Esp. N. P. C. 343; *Fairthorne v. Donald*, 13 M. & W. 424; *Vivian v. Jenkins*, 3 Ad. & E. 741, 5 N. & M. 14; *Salomons v. Lyon*, 1 East, 369; and *John De Puseto's case*, M. 21, H. 7, fo. 80, pl. 10.

*213] *T. Jones*, (the next day,) in reply, insisted, upon the authority of *Briscoe v. Hill*, 10 M. & W. 735, that the replication was bad for not tendering an issue as to the equality of the debt alleged to be due to the plaintiff with that due from him. The point of equality is neither confessed nor avoided. [WILDE, C. J. Does not *modo et forma* meet that? MAULE, J. By replying that he is not indebted in the residue, the plaintiff says, in effect, that he never was so indebted as stated in the plea. It is the negative of what is alleged. Still, I think the replication should have concluded with a verification of the whole. V. WILLIAMS. Suppose the plea had set off a judgment debt, and a simple-contract debt barred by the statute of limitations; must not the plaintiff have replied *nul tiel record* to part, and the statute as to the remainder?] Assuming that the statute of limitations may be replied to a plea of set-off, it does not follow that a discharge of the plaintiff under the insolvent debtors act may. The statute of limitations bars the right of action, whereas this statute merely gives a plea: *Remington v. Stevens*, 2 Stra. 1271. Upon this very statute, it has been decided that the remedy by distress is not taken away; and, however plausible the distinction set up on the other side may be, it is one not recognised by the act, which is entirely silent upon the point. The 91st section of the 1 & 2 Vict. c. 110, evidently contemplated the case of a *plea* only, and not of a *replication*; and, at all events, if good in substance, the replication here is bad in form, for the causes specially assigned. It would have been more advantageous to the plaintiff to have replied the special matter, as he might thereby have narrowed his proof at the trial. *Cur. adv. vult.*

*214] *WILDE, C. J., now delivered the judgment of the court.

In this action the plaintiff declares in debt for the price and value of work done and materials provided; and also for interest; and for money due upon an account stated.

The case comes before the court upon a demurrer to the plaintiff's replication to the defendant's second plea, which is a plea of set-off of money "equal to the amount of all the debts in the declaration mentioned, and all damages sustained by the plaintiff by reason of the non-payment thereof," except as to 10*l.*, for work and labour as a surgeon and apothecary, and for medicines and other necessary things found, provided, and administered by the defendant for the plaintiff, and for good sold and delivered, and for money found due upon an account stated.

To that plea the plaintiff has replied, that, after the sum of 30*l.* 12*s.* 6*d.*, parcel of the sum of money stated to be due and owing from the

plaintiff to the defendant, had become due and owing, to wit, on the day named in the declaration, by a certain order then made by the court for the relief of insolvent debtors, held at the court-house in Portagal Street, Lincoln's Inn Fields, in the county of Middlesex, the plaintiff, then being an insolvent debtor in actual custody, and a prisoner in the debtors' prison for London and Middlesex, in the city of London, was duly discharged, according to a certain act of parliament made and passed in a certain session of parliament, &c., &c.—1 & 2 Vict. c. 110,—of and from the said sum of 30*l.* 12*s.* 6*d.*, parcel, &c.; *with this*, that the said order and discharge still remain in full force—verification.

To this replication the defendant has specially demurred, assigning several causes of demurrer, and amongst others, that the replication does not show how or in what manner the plaintiff was discharged from the *said sum of 30*l.* 12*s.* 6*d.*, or that the plaintiff was in any manner entitled to relief under or by virtue of the said act of parliament, or that the plaintiff had in any manner complied with the provisions of the said act, or that the plaintiff had given the proper notices required by the said act, or that the plaintiff had inserted the said sum of 30*l.* 12*s.* 6*d.*, or any sufficient description thereof, or of his debts due and owing to the defendant, in his schedule as such insolvent debtor.^(a) [*215]

Upon the argument, the several grounds of the special demurrer were discussed; and the defendant also insisted, as matter of general demurrer, that the replication was bad in substance, inasmuch as the discharge of the plaintiff under the insolvent debtors act had not the effect of extinguishing the debts then owing by him, so as to prevent their being available by way of set-off; but that the benefit to which the plaintiff was entitled, under the act of parliament, and the order of adjudication and discharge, set out in the replication, was, his discharge from prison, and the protection of his person from future arrest, and the protection of his after-acquired property from liability to seizure under writs of execution founded upon judgments upon debts owing before the order of discharge: and it was contended, that, notwithstanding such order of discharge, the creditors may avail themselves of any legal mode or remedy to obtain satisfaction of their debts, not expressly taken away or prohibited by the statute: and, especially, that such debts may be pleaded by way of set-off in any action brought to recover any demand which, subsequently to the discharge, may have accrued due to the insolvent from the creditor.

As the court is of opinion that the replication is bad, upon the ground urged in the demurrer, that it does not set out the several matters necessary to show that the *plaintiff was entitled to his discharge under the statute, and that he had duly complied with the [*216]

(a) The residue of the record (ante, 206, 7) is not noticed.

requisitions of the statute, it will only be necessary to advert to that cause of demurrer, and to the objection taken to the replication in point of substance,—that is, that the effect of a discharge under the statute does not extinguish the debts owing by the insolvent, or discharge the insolvent from his debts, in any sense which precludes the defendant from pleading a set-off in respect of the debt due to him from the plaintiff before his discharge.

The effect of the discharge under the insolvent act depends upon the construction of sections 75, 87, 90, and 91.

By sect. 75, it is enacted, that, after the examination of the prisoner, as in the act directed, it shall be lawful for the court,—upon the prisoner's swearing to the truth of his schedule, and executing the warrant of attorney therein mentioned,—to adjudge that the prisoner shall be discharged, and entitled to the benefit of the act, as to the several debts and sums of money due or claimed to be due to the persons claiming to be creditors, and other persons mentioned in the section, at the time of the making the vesting order before referred to in the act. This section does not give a discharge from the debts, or state what the benefits are to which the debtor is to be entitled.

The 87th section enacts, that, before any adjudication shall be made with respect to the prisoner, he shall be required to execute a warrant of attorney to the assignee, for the amount of the debts in the schedule; and that, if, at any time thereafter, it shall appear to the satisfaction of the court that such prisoner shall be of ability to pay his debts, or any part thereof, or that he has died leaving assets, the court may permit execution upon such judgment to be taken out for such sum of money, as, under all the circumstances of the case, the court *shall
*217] order,—such sum to be distributed ratably among the creditors, as directed by the act; and that such further proceedings may be had upon such judgment as to the court shall seem fit, until the whole of the debts, and costs, shall be paid and satisfied.

By sect. 90, it is enacted, that no person who shall have been adjudged entitled to the benefit of the act, shall be imprisoned upon such judgment, or with respect to any debt or sum of money, or costs, with respect to which such persons shall have become so entitled, or for or by reason of any judgment, order, or decree for payment of the same; but that, upon every such arrest or detainer on any such judgment, or for or by reason of any such debt, judgment, order or decree for payment of the same, the insolvent is to be discharged by any judge of the court out of which the process may issue.

By sect. 91, it is enacted, that no writ of *feri facias* or *elegit* shall issue on any judgment obtained against a prisoner who shall have so become entitled to the benefit of the act, for any debt or sum of money in respect to which the person shall have become so entitled, except upon the judgment entered up under the act; and that, if any suit or

action shall be brought, or *scire facias* issued, for any such debt or sum of money, or upon any new contract or security for the payment thereof, or upon any judgment obtained against, or acknowledged by, such person, it shall be lawful for such person, his heirs, executors, or administrators, to *plead, generally, that such person was duly discharged* according to the act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiffs may reply generally, or reply any matter which may show that the defendant was not entitled to the benefit of the act, or was not duly discharged under the same.

*Such are the sections relating to the discharge of the debtor. [*218

Some ambiguity arises in regard to the extent of the benefit which the statute intended to afford to the insolvent debtor. It is limited, in terms, to a discharge from prison, to being exempted from any action in respect of any antecedent debt or judgment, and to the protection of goods of the debtor from the process of execution in respect of such former debts. But it is to be observed, that, before the debtor is entitled to his discharge, he is required to give a judgment to the assignee of the court; so that a judgment is, in effect, obtained for the benefit of every creditor, for his debt.

It would appear to be somewhat severe to leave the creditors individually in possession of remedies against the future effects of the insolvent, and to leave the insolvent exposed to the fullest remedy against both his person and effects under the judgment, in addition. Further, this judgment so given is under the control of the court, and can only be made available for the general benefit of the creditors, by distribution; and the debtor can only be coerced, under the judgment, to the extent of his ability to pay, established to the satisfaction of the court, from time to time.

It will be observed, further, both the insolvent's person and his future effects are protected against actions and judgments in respect of the scheduled debts,—whether such judgments are obtained before or after the discharge,—and also against both actions and judgments founded upon new contracts relating to the scheduled debts; and the insolvent is entitled to plead his discharge, in a general form, in bar of any such action.

It appears, therefore, that, although the debt is not, in terms, extinguished, or the insolvent discharged therefrom, yet laborious care has been taken to exclude and bar all means by which the debtor, who has given *up the whole of his property, could, in respect of his former debts, be in any way coerced by the creditors individually, or his future effects in any way made liable, to the payment of the scheduled debts. [*219

The reasons are obvious for not extinguishing the debt; such as, to

preserve liens and remedies against sureties, and also to enable the creditors to set off their debts against cross-demands^(a) on the part of the insolvent debtor: but it is not obvious why so much care should be taken to exclude the remedies expressly mentioned in the act, and all apparent means of creditors obtaining preferences, and that others should be left open to the creditor, by which the apparent general intention of the statute might be defeated, that is, the protection of the insolvent's future property, and the exclusion of individual preference out of the insolvent's future effects. It must, however, be admitted, as before stated, that the debt is not extinguished, nor is the insolvent, in terms, discharged from it; and, accordingly, it has been held that the insolvent's future effects may be distrained for rent which accrued due prior to the discharge. But, although the insolvent is not expressly discharged from his debts, or protected against every possible mode by which payment or satisfaction may be obtained, it remains to be considered whether the debt referred to in the plea can be made available by way of set-off.

Upon this question, it is necessary to advert to the statute by which the right to set-off is given, and the decisions upon it. The statute is the 2 G. 2, c. 22, s. 13. It is enacted in that section, "that, where there are mutual debts between the plaintiff and the defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in *220] *evidence upon the general issue, or pleaded in bar, as the nature of the case may require; so as, at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted upon in evidence, notice shall be given of the particular sum or debt so intended to be insisted upon, and upon what account it became due, or otherwise such matter shall not be allowed in evidence under such general issue."

The judicial construction of this section has been, that no debts can be used by way of set-off under this statute, except such as are recoverable by action; and it has accordingly been held that the statute of limitations may be replied to a plea of set-off.

It is clear that the debt pleaded by way of set-off in this case could not have been recovered by action, inasmuch as, by the 91st section of the 1 & 2 Vict. c. 110, the order or adjudication of discharge might have been pleaded in bar to any such action: and, for some purposes, the plea of set-off has been considered in the nature of, or as analogous to, a declaration. In *Chapple v. Durston*, 1 C. & J. 1, it was held, that, to a plea of set-off, the statute of limitations must be specially replied: and it was stated in the judgment, that a plea of set-off has ever been considered in the nature of a cross-declaration. And in *Ford v. Dorn-*

(a) q. d. cross-demands accruing before the insolvency.

ford, 15 Law J., N. S., Q. B. 172, PATTESON, J., adopts the case of *Chapple v. Durston*.

It seems to us, therefore, that, as the debt sought to be set-off by this plea, is not, under the existing circumstances, a debt for which the defendant could have maintained an action, it cannot be availably used by way of set-off; and that the order and adjudication of discharge would be a legal answer to the plea, if properly replied.

*It only remains, therefore, to be considered, whether the replication can be sustained against the objections in point of [*221 form which have been urged against it: and we are of opinion that the replication cannot be supported, in the general form in which it has been pleaded.

It is admitted, that, unless it can be supported under some express or implied authority to be derived from the statute, it is a bad replication at the common law and under the general rules of pleading.

In support of the demurrer, it was urged, that, as the statute gives authority to plead the order generally only in a given designated instance, the authority so to plead cannot be extended, and applied to other cases than that pointed out by the statute; that the power to plead generally is given to a *defendant* in answer to a declaration; and that no direct authority has been produced to warrant or sanction the position that a general form of plea given in one instance may be adopted in all other cases which are supposed to be within the principle or reason which induced the power in question to be granted.

On the part of the plaintiff it was contended, that, the general form of plea being given to an insolvent to protect him from being charged in respect of the debts from which he has been discharged, all the reason for giving the general plea equally applies to a replication in answer to a plea, by which it is sought to do that which the legislature intended to prevent from being done, by giving the general plea: and *Chapple v. Durston* and *Ford v. Dornford* were cited; in the latter, of which PATTESON, J., is reported in his judgment to have said, that, although the discharge under the act of parliament in question must be specially replied, when it is sought to be used by way of answer to a plea of set-off, yet that the decision of the court did "not go the length of establishing that it is necessary, in the case of replying *a discharge [*222 under the insolvent act to a plea of set-off, to set out all the proceedings under the insolvent act. On the contrary, if the decision in *Chapple v. Durston* amounts to a decision that a plea of set-off is a cross-declaration, then it may be that the replication to such a plea might be in the form which the act gives as the form of a plea to a declaration."

We have considered this suggestion, with all the deference which the court would ever be disposed to extend to the intimation of an opinion by that learned judge: but, as it is a *mere* intimation of opinion, and

not a decision by him, and as no authority accompanies the intimation, we are not satisfied that such a replication as that suggested can be sustained.

It may be correct, for some purposes, to consider the plea of set-off as a declaration: but we do not feel ourselves called upon, or warranted in saying that the analogy exists for all purposes. The matter of set-off may require to be disclosed by the plea, so as to show that the debt sought to be set off is such as would form a cause of action in a declaration; but it does not follow that the rules which would govern the pleadings subsequent to a declaration, regulate those which might follow a plea of set-off.

It would be difficult successfully to contend that a plaintiff may reply as many different matters to a plea of set-off as may be pleaded to a declaration for the same matters as those contained in the plea. (a) It *228] is clear that that part of the statute which gives a general form of plea, did not contemplate a replication; and that, however inconsistent with the general provisions of the act it would be to allow a scheduled debt to be set-off, yet the statute does not provide for the case; and we are not aware of any admitted principle, or decision, which will sanction the court in supplying the omission. (b)

The bankrupt act of 5 G. 2, c. 80, s. 5, gives a general plea to the bankrupt in certain cases; and bankrupts have often found it necessary to set up their certificates by way of answer to actions brought against them, not falling within the terms of the act; but, except in the cases in which the general plea is expressly given, it has been the practice to plead the bankruptcy specially, by setting out the essential parts of it; (c) and no case has been cited in which it has been even attempted, much less sanction allowed, to use the general plea in other cases than those in which it is expressly given; and the language of the statute is clear and express as applied to the plea.

In the absence, therefore, of any decision which warrants such a

(a) The 4 Ann. c. 16, s. 2, limits the power of *plaintiffs* to set up double answers to the single action of replevin.

In framing the statutes of set-off, the legislature does not appear to have had the 4 Ann. c. 16, under its consideration; and those statutes leave a party against whom a demand is sought to be enforced by way of set-off, without the protection to which the statute of Anne had declared that he is entitled, when sued as a defendant. Here, if Francis had been sued by Dodsworth, he might have pleaded *non assumpsit, non assumpsit infra sex annos*, a set-off, and the general statutory plea of insolvency; and he would, in all probability, have obtained a verdict, establishing each of these defences,—the demand consisting of a disputed account running over a period of twelve years. But, in this action, he was put to his election. Had the right to plead double been a right existing at common law, as in the case of the crown, the same right would, no doubt, have attached to *replications* to pleas of set-off, upon the general principle—*ubi eadem est ratio, idem est jus*.

(b) *Quere*, whether any argument founded upon this omission would not have been applicable to the substance, as well as to the form, of the replication.

(c) The plea of bankruptcy is a form of words to which the legislature has given an operation wholly different from that which the words themselves import. *Quere*, whether to have extended this statutory effect to cases not provided for by the act of 5 G. 2 would not have been an exercising of a power of legislation.

course of pleading, we are of opinion that *the replication is bad, and that the demurrer must be allowed. (a) [*224

Other objections have been urged to the form of the replication, to which it is not necessary to advert, as the judgment must be for the defendant, upon the objection already stated.

As the court consider that the order of adjudication of discharge under the insolvent debtors' act furnishes a substantial answer to the plea of set-off, and that the objection urged to the replication is one of form, we think the plaintiff ought to be allowed to amend, if he thinks fit, upon payment of costs. Rule accordingly. (b)

(a) Vide 1 M. & G. 202, n.

(b) The defendant originally demurred to the whole replication, and *also* joined issue upon that part of the replication which concluded to the country. A rule was obtained, in Trinity term, 1846, calling upon the defendant, in the alternative, either to strike out his joinder in issue, or to restrict his demurrer to the first part of the replication,—the part on which issue was not taken. The plaintiff having, through poverty, suffered a term to elapse before he made this application, it was contended that he came too late. It was answered, that the defect was one of which the judges were themselves bound, *ex officio*, to require the correction, whenever such an abuse should be brought under their notice. This view was adopted by the court, and the rule was, in the same term, made absolute,—to restrict the defendant's demurrer to the first part of the replication,—the defendant having elected to retain his joinder in issue: but on the ground of the delay which had occurred, the court refused to give the plaintiff his costs. Notwithstanding the terms in which the rule had been made absolute, the defendant, in that which was delivered under the rule as his amended assignment of causes of demurrer (*suprà*, 204,) retained objections which went to the *whole* replication; and it was upon those very objections that the judgment of the court ultimately proceeded. There is nothing, however, upon the face of the judgment pronounced which indicates in any way that it was the intention of the court to revoke its former judgment.

The plaintiff being unable to continue this somewhat expensive contest, the action was abandoned.

END OF HILARY VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Easter Term,
IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were,
WILDE, C. J. CRESSWELL, J.
COLTMAN, J. V. WILLIAMS, J.

The following notice was, in this term, read in court, and stuck up at the judges' chambers:—

Costs of attendance of counsel at chambers.

“The costs of the attendance of counsel before a judge at chambers, will in no case be allowed in future, unless the judge shall certify their allowance.

“April 16, 1847.”

*226] *In the Matter of G. P. ANDREWS, a Prisoner. *April 15.*

This court has no power to discharge upon a *habeas* a prisoner from custody under process of the Court of Chancery, and cannot entertain any question as to the irregularity of such process.

On the 10th of March, 1829, Mr. Andrews (a) filed a bill in Chancery against Walton and others, which was on the 10th of June, 1831, dismissed by the Vice-Chancellor, with costs. The costs were afterwards taxed at 107*l.* 19*s.* 2*d.* An appeal against the Vice-Chancellor's decree was, on the 31st of December, 1832, dismissed by the Lord Chancellor, with costs. On the 14th of January, 1833, whilst returning from

(a) Vide *Andrews v. Palmer*, 4 B. & Ald. 250.

an attendance on the registrar to settle the Chancellor's decree, Andrews was arrested upon process of contempt, for non-payment of 107l. 19s. 2d. costs; which process was tested on the 12th, and returnable immediately, and directed to the sheriff of Middlesex. Another writ, in the same form, and tested on the same day, was issued against him for the same cause, directed to the sheriffs of London. On the 16th, Andrews was discharged from custody, by the direction of the party who had so caused him to be arrested; and, on the 11th of March, he was again arrested for the same sum of 107l. 19s. 2d., under a second writ of attachment issued by the same party in... London, tested the 14th of February.

Having unsuccessfully moved the Vice-Chancellor, and (by appeal) the Lord Chancellor, and the House of Lords, for his discharge from custody under the last-mentioned process, on the ground that, by the practice of the court, a writ of attachment returnable immediately, if unexecuted, is in force only until the end of the term following that in which it is tested, and that it is irregular to have two concurrent writs of attachment into the same county for the same cause,

**Andrews*, in person, being brought up by *habeas corpus*, [*227 now applied to this court to discharge him from the alleged illegal detention. At common law, it is perfectly clear that a defendant cannot be taken in execution twice for the same demand. In Bacon's Abridgment (a) it is said, that, "if a man in execution upon a judgment for debt or damages, be delivered out of execution by the sheriff or jailor who hath him in execution, with the assent of him at whose suit he is in execution, and after, by colour of this judgment, he takes him again, and puts him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered." An attachment for non-payment of costs is in the nature of an execution: *Bartram v. Dannett*, 5 Vin. Abr. tit. "Contempt," pl. 10, p. 451; *Benn v. Denn d. Mortimer*, Barnes, 180; *Rex v. Stokes*, Cowp. 136; *Bonafous v. Schoole*, 4 T. R. 816; *Phelips v. Barrett*, 4 Price, 23; (b) *Blower v. Hollis*, 1 C. & M. 393; Hullock on Costs, 2d edit., p. 652: and a defendant who has been discharged from execution, by the plaintiff's consent, cannot be taken a second time on the same judgment—*Jaques v. Withy*, 1 T. R. 557; *Clark v. Clement*, 6 T. R. 525; *Tanner v. Hague*, 7 T. R. 420; even though he was discharged the first time upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on: *Blackburn v. Stupart*, 2 East, 243; *Da Costa v. Davies*, 1 B. & P. 242.

(a) Tit. "*Audita querela*," 6th & 7th edit., Vol. I. p. 310; citing *Welby v. Andrews*, 1 Roll. Abr. 307.

(b) But, in *Lewis v. Morland*, 2 B. & Ald. 56, it was held that, in the King's Bench, an attachment for non-payment of costs is in the nature of *mere* process. And see *Phummer v. Savage*, 6 Price, 130.

*228] *COLTMAN, J.(a) This court has no power to enter into an inquiry as to the regularity of process issuing out of the Court of Chancery.

CRESSWELL, J. The Court of Chancery had undoubted authority to issue the writ: and it is equally beyond a doubt that *we* have no authority to inquire whether it has issued regularly or not.

V. WILLIAMS, J. concurring, The prisoner was remanded.(b)

(a) Wilde, C. J., was absent.

(b) And see *Stanford v. Robinson*, 3 M. & G. 407, S. C. *per nom.* *In re John Stanford*, 4 Scott, N. R. 23.

DUBOIS v. LOWTHER. April 19.

Upon a motion for a distringas, an affidavit stating that the deponent "explained the nature and object of his visit," is insufficient.

O'BRIEN moved for a distringas, upon an affidavit sufficient in all respects, except, that, in describing what had passed at the time the calls were made, the statement of the deponent was merely that he "explained the nature and object of his visit."

WILDE, C. J. The books of practice give a form of affidavit which it is very convenient, and saves much trouble, to adhere to, with reasonable strictness. This affidavit is too loose: the deponent should state distinctly what he *did* say. Let it be amended in this respect, and re-sworn.

The amendment having been made, and the affidavit re-sworn, the rule was
Granted.

*229] *WALKER v. PILBEAM. April 20.

The drawer of a bill of exchange, who has paid the amount to an endorsee after a *fiat* in bankruptcy issued against the acceptor, may sue the latter upon the bill, before he has obtained his certificate, notwithstanding the endorsee has proved under the *fiat*.

A FIAT in bankruptcy having issued against the defendant, one Wilder, who had obtained judgment against him in an action upon a bill of exchange of which he (Wilder) was endorsee, proved his demand against the defendant's estate, and successfully opposed the allowance of his certificate,—the allowance being suspended for twelve months. The plaintiff, the drawer of the bill, afterwards paid the amount thereof, and brought another action upon it.

Pearson now moved to stay the proceedings, on the ground that the proof under the *fiat* was an election to abandon the security.(a) He

(a) Under the 6 G. 4, c. 16, s. 59, which enacts that "the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit

relied on *Geikie v. Hewson*, 4 M. & G. 618, 5 Scott, N. R. 484. There, pending an action of debt by A. against B. as acceptor of a bill for 648*l.* 1*s.* 9*d.*, and for 1500*l.*, for goods sold and delivered, &c., A. filed an affidavit in the court of bankruptcy, under the 1 & 2 Vict. c. 110, s. 8, stating B. to be indebted to A. in 648*l.* 1*s.* 9*d.*, for goods sold and delivered, and also upon a bill for 648*l.* 1*s.* 9*d.* Afterwards, on the 11th of February, B., with C. and D. as his securities, gave a bond to A. conditioned for repayment of such sum as should be recovered in the action for the alleged debt, or for the render of B. On the 15th of March, a *fiat* in bankruptcy was awarded against B. On the 21st of March, A. signed judgment against B. for 1332*l.* 19*s.* 6*d.* On the 5th of April, A. proved under the *fiat* for 864*l.* 12*s.* 9*d.* being the amount of the judgment debt *excluding the 648*l.* 1*s.* 9*d.* On the 12th of April, a *ca. sa.* [*230 against B. was lodged with the sheriff. On the 30th of May, A. brought an action against C. and D. on the bond: and it was held, that the proof under the *fiat* was an election to relinquish the action against B., and that B., being entitled to be discharged if rendered, C. & D. were entitled to have the proceedings stayed.

CRESSWELL, J. The drawer does not derive title from or under the endorsee.(a) How, then, can his rights be altered or affected by the circumstance of the endorsee having proved *his* demand under the *fiat*? I find the point expressly decided in *Mead v. Braham*, 3 M. & S. 91, where it was held that the drawer of a bill of exchange, who had paid the amount to the holder after a commission of bankruptcy issued against the acceptor, might sue the acceptor before he had obtained his certificate, and arrest him upon the bill, notwithstanding the holder had proved the bill under the commission. It was there insisted, that, by the 49 G. 3, c. 121, s. 8,(b) the plaintiff, by paying the bill, stood in the place of the creditor who had proved, and became entitled to the dividends under such proof, and, therefore, by s. 14, it was not competent to him to maintain any action against *the defendant in respect of it; and [*231 that, as the defendant would have been discharged had he obtained his certificate, the proof must be deemed to be an election. But Lord ELLENBOROUGH "inquired if there were any words in the statute

of such commission, with respect to the debt so proved or claimed;"—a similar provision to that contained in the 49 G. 3, c. 121, s. 14.

(a) The drawer is a party who engages to guaranty the payment by the drawee, to the payee and his endorsees. The *title* of the drawer, as such, to the ownership of the bill,—his right to demand payment or to sue,—first accrues when he has been compelled by the payee, or an endorsee, to satisfy that engagement; and, upon doing so, he may be said to stand in the place of the original creditor whom he has thus guarantied, and to whose rights, except as against an intermediate endorser, he has succeeded. Vide 1 M. & R. 305, n., 308, n., Mann. N. P. Digest, 89, pl. 249, as to the rights of a holder who has become so, as acceptor *supra* protest.

If however, the drawer were bound by the act of the endorsee in proving under the *fiat*, the endorsee might, by so proving, lessen the remedies which the drawer would be entitled to exercise on the bill being returned to him, and the endorsee would, it should seem thereby discharge the drawer as fully as if he had given time to the drawee.

(b) And see the 6 G. 4, c. 16, s. 52.

compulsory upon a party, who pays the debt for which the bankrupt is liable, to come in under the commission; for, if not, the proving under the commission could only be deemed an election so far as it personally regarded the creditor who proved, but not to affect the right of third persons." And DAMPIER, J., added, "that it would be hard to deprive the plaintiff of the chance of recovering against the bankrupt before he has obtained his certificate; because in the event of his obtaining it, the bankrupt would be discharged."

The rest of the court concurring,

Rule refused.

ROBERTS v. PRICE. April 21.

By the rules of a friendly society, enrolled under the 10 G. 4, c. 56, the power of electing a treasurer and other officers was vested in a committee of *eleven*. At a meeting of the committee, at which *ten* of the members only were present,—the eleventh not having received notice,—the defendant, the former treasurer, was removed, and the plaintiff appointed in his stead, by a majority of votes:—*Held* that the election was void, although the absent committee-man had, for a considerable period, ceased to attend the meetings, and had intimated an intention not to attend any more, and although the defendant himself had demanded a poll.

DEBT, for money had and received, brought by the plaintiff as treasurer of a friendly loan society called "The Overton Friendly Society," enrolled pursuant to the 10 G. 4, c. 56, with a count in detinue for deeds, &c., belonging to the plaintiff as such treasurer.

Pleas, denying that the plaintiff was treasurer, and also that the deeds &c. belonged to him as treasurer.

The case was tried before COLTMAN, J., at the last Flintshire assizes. The contest was whether the plaintiff or the defendant was the legally appointed treasurer. It appeared, that, on the 29th of March, 1844,
 *232] the *society in question had, in conformity with the 12th section (a) of the act, appointed a committee of eleven persons to

(a) By which it is enacted, that every society formed under the authority of that act, shall, and may from time to time elect and appoint any number of the members of such society to be a committee, the number thereof to be declared in the rules of every such society, and shall and may delegate to such committee all or any of the powers given by this act to be executed; who, being so delegated, shall continue to act as such committee for and during such time as they shall be appointed for such society, for general purposes, the powers of such committee being first declared in and by the rules of such society, confirmed by the justices of the peace at their sessions, and filed in the manner hereinbefore directed; and, in all cases where a committee shall be appointed for any particular purpose, the powers delegated to such committee shall be reduced into writing, and entered into a book by the secretary or clerk of such society; and a majority of the members of such committee shall at all times be necessary to concur in any act of such committee; and such committee shall, in all things delegated to them, act for and in the name of such society; and all acts and orders of such committee, under the powers delegated to them, shall have the like force and effect as the acts and orders of such society at any general meeting thereof could or might have had in pursuance of this act: Provided always, that the transactions of such committee shall be entered in a book belonging to such society, and shall be, from time to time, and at all times, subject and liable to the review, allowance, or disallowance, and control of such society, in such manner and form as such society shall by their general rules, confirmed by the justices, and filed as aforesaid, have directed and appointed, or shall in like manner direct and appoint."

conduct the affairs of the society; one of the parties so appointed being a person named Craven. By the 4th rule of the society it was provided that the committee to be appointed should have the entire management of its affairs, and that the treasurer for the time being should be elected by the committee.(a)

*It further appeared, that certain members of the committee being dissatisfied with Price, the treasurer, a meeting was called [*233 on the 5th of May, 1846, to consider the propriety of removing him; that all the members of the committee attended, with the exception of Craven, to whom it was not shown that any notice of the meeting had been given; and that, at that meeting, the votes of the committee having been taken, it was agreed that Price should be expelled, and Roberts appointed treasurer in his stead. The entry of the transaction in the society's book was as follows:—"Ordered, that Mr. Thomas Price, treasurer, has been polled out of his office by a majority of four: Ordered, that Mr. Timothy Roberts, jun., of Overton, be elected treasurer, and is hereby elected, by a majority of seven."

In order to dispense with the necessity of proving a notice to Craven, evidence was given of his having discontinued his attendance at the meetings of the committee for about two years, and of his having intimated an intention not to attend any more; and it was shown that, at the meeting in question, the defendant Price himself had demanded a poll.

The learned judge, being of opinion that the election was invalid for want of notice to Craven, directed a nonsuit, but reserved leave to the plaintiff to move to enter a verdict as the court should think fit.

Welsby now moved accordingly. He submitted, that, inasmuch as Craven had ceased to attend the meetings of the committee, and had announced his intention not to attend, it was not necessary to prove notice to him; and that Price, the defendant, had himself waived the necessity of proving notice to Craven, by demanding a *poll in [*234 his absence. [CRESSWELL, J., referred to *The King v. Langhorne*, 4 Ad. & E. 538, 6 N. & M. 208. There, to a *quo warranto* for exercising the office of mayor of a borough, the defendant pleaded, that, by charter, the corporation had power to elect a burgess for mayor; and that, by custom, there was an indefinite number of free burgesses, and the mayor, bailiffs, and burgesses, being duly assembled, might elect whom they would for burgess; that he (the defendant) was elected burgess at a meeting duly assembled, according to the custom of the bo-

(a) The 11th section enacts "that every such society shall and may, from time to time, at any of their usual meetings, or by their committee, if any such shall be appointed for that society, elect and appoint such person into the office of steward, president, warden, treasurer or rustee of such society, as they shall think proper, and also shall and may from time to time elect and appoint such clerks and other officers as shall be deemed necessary to carry into execution the purposes of such society, for such space of time and for such purposes as shall be fixed and established by the rules of such society, and from time to time to elect and appoint others in the room of those who shall vacate, or die.

rough, and was afterwards duly elected mayor according to the charter. The crown traversed the fact that the meeting at which he was made a burgess was duly assembled.

It appeared at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses by the burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting, and, if he required it, of its object; but that the custom must be taken with the qualification that an accidental omission to serve a resident burgess was not a violation of it. It also appeared, that R., a resident burgess, had told the officer whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve R., who was in fact in the borough at the time of the meeting. The jury found expressly that the omission to serve R. was accidental. But the court held, that the qualification of the custom, as to accidental omissions, was bad in law; that the omission to serve R. was not accidental; and that the service of notice could not be waived.] It is true the court there held the meeting illegal, for want of a due service of the notice; and that Lord DENMAN, *arguendo*, intimates, *that, it being the duty of every elector to attend, the service cannot be waived. This, however, is rather the appointment of a servant than the election of an officer. [WILDE, C. J. The first question is, whether the defendant was duly removed from the office of treasurer. CRESSWELL, J. It may be a question whether the committee had power to displace Price. The 11th section of the statute gives them power, from time to time, to elect and appoint officers in the room of those who shall vacate or die; but it does not expressly empower them to remove.] By the demand of a poll of those present at the meeting, the defendant has precluded himself from urging this objection. [WILDE, C. J. How could he know that the proper notices had not been given? Craven could not waive his right to notice: the general body had a right to the benefit of his judgment.] The presence of Craven could not have made the result different.

WILDE, C. J. It strikes me that the point presented for our consideration is not open to any considerable doubt. Here is a body of persons, in the nature of trustees, charged with the performance of a certain duty. To hold that a meeting may be held without due legal notice to the whole of the members, might give occasion for great fraud in the case of a corporation; and the objection would be stronger in the case of a society like this. The only ground upon which the meeting of the 5th of May, 1846, at which less than the whole number were present, could be held valid, would be, that Craven had dispensed with notice. But, he filling the character of a trustee, I am not aware that he had any power so to do. He had not, by sending in his resignation,

ceased to be a member of the committee: and, although he had for some time failed to attend its meetings, *non constat* but that he might have felt it to be his duty to attend when he knew that the meeting was called for a purpose so important as the removal of the treasurer, and the *election of a successor. It was right that he should have an [*236 opportunity of attending. At all events, in the absence of a notice to him, I am of opinion that the meeting was not legally constituted, and consequently that it was not competent to them to remove the defendant from his office.

CRESSWELL, J. I am entirely of the same opinion. *The King v. Langhorn* seems to me to be directly applicable. Craven clearly could not waive the notice.

V. WILLIAMS, J., concurred.

Rule refused.

BOWYER v. COOK. April 22.

In trespass for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him:—*Held*, that the leaving the stumps and stakes on the land was a *new trespass*; that the plaintiff was entitled to full costs in an action for their continuance after the notice, though he recovered less than 40s., and the judge refused to certify that the trespass was wilful and malicious, under the 3 & 4 Vict. c. 24, s. 2; and that the proper mode of obtaining such costs, was, by entering a suggestion on the record, under the 3d section, that the trespass was committed after notice.

THIS was an action of trespass brought to recover damages in respect of trespasses alleged to have been committed by the defendant "in a close and ditch and on a bank adjoining and belonging to a farm occupied by the plaintiff, between the 1st of September, 1845, and the 15th of April, 1846,—the day of the commencement of the action,—which trespasses consisted in continuing to cause certain water to run out of a close occupied by the defendant, into certain land belonging to the plaintiff, and in continuing a platform of earth on the plaintiff's land and ditch, and at *the foot of his bank; and also in continuing [*237 wooden stumps and stakes on the said ditch and bank." The defendant, amongst other pleas, pleaded that the close in question was not the close of the plaintiff.

The cause was tried before PARKE, B., at the last summer assizes at Hertford, when a verdict was found for the plaintiff, damages 20s. The learned judge was thereupon asked to certify, pursuant to the 3 & 4 Vict. c. 24, s. 2, that the action was brought to try the plaintiff's right to the land upon which the trespasses complained of were committed, or that the trespasses were wilful and malicious, and committed after notice not to trespass. (a) He, however, refused to grant such certificate. 53am 124; 57 Mich 89;

(a) This notice,—which was admitted under a judge's order, and read at the trial,—was not "served on the defendant or left at his last reputed or known place of abode," but was transmitted to his address by post.

Channell, Serjt., in Michaelmas term last, obtained a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to enter a suggestion on the roll "that the trespasses in respect of which the plaintiff has recovered his verdict in this cause, were committed by the defendant after notice," to entitle the plaintiff to his costs of the action. The affidavits upon which the rule was founded, after stating the nature of the action, and the result of the trial, alleged that a former action had been brought by the plaintiff against the defendant on the 2d of May, 1845, for trespasses committed in the same close as was mentioned in the particulars delivered in this action, being the trespasses for a continuance of which this action was brought; that, in such former action, the defendant on the 5th of June, 1845, pleaded payment into court of 40s. in respect of the causes of action in the declaration *238] mentioned, and *which sum was by the plaintiff's replication accepted and taken out of court in full satisfaction and discharge of the causes of action in the said declaration mentioned; that judgment was signed in such former action on the 80th of July, 1845; that, previously to the commencement of this action, to wit, on the 8th of August, 1845, the plaintiff's attorneys wrote and sent to the defendant a notice, of which the following is a copy—"We are requested by Mr. Bowyer to give you notice, that, unless you divert the course of the water, so as to prevent its flowing over his land and ditch, and restore the ditch to its former state, and remove the earth, stumps, stakes, and other encroachments on his land and fence, in the parish of Ippolitts, in such a manner as shall be satisfactory to him, a further action will be brought against you previously to Michaelmas term;" (a) and that, on the trial of the second action, evidence was given on the part of the plaintiff, to establish his right to the close in question, and to show that the defendant had been guilty of the trespasses complained of in the second action.

Peacock now showed cause, upon an affidavit stating, that the trespasses in respect of which the verdict was given in this action, were, the continuing a small platform of earth and wooden stumps or stakes which were upon the plaintiff's land at the time of the payment into court by the defendant of the 40s., and the acceptance thereof by the plaintiff in satisfaction of the causes of action for which the previous action had been brought; and that the plaintiff's land and ditch had remained in the same state from before the time of the commencement of the said previous action, down to the present time, without any thing having been done or committed to the same by the defendant, or by his authority. There was nothing *to prevent the learned judge from *239] certifying in this case that the trespass was wilful and malicious, if he had thought fit so to do, under the 3 & 4 Vict. c. 24, s. 2. The only doubt here arises from the 8d section, which enacts "that

(a) As to the form of notice, vide *Bourne v. Lock*, 4 Q. B. 621.

nothing herein contained shall extend to, or be construed to extend to, deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, out-buildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served by or on behalf of the owner or occupier of the land trespassed over, *upon, or left at the last reputed or known place of abode of*, the defendant or defendants in such action or actions." (a) The case of *Sherwin v. Swindall*, 12 M. & W. 783, shows that the judge might have certified, notwithstanding that proviso, which, as is there observed by POLLOCK, C. B., was introduced only to prevent its being supposed that the statute of Victoria interfered with the 8 & 9 W. 3, c. 11, s. 4. PARKER, B., in that case, says: "At the trial, the point I intended to reserve was this:—I thought the act done by the defendant was not malicious in the ordinary sense of the word; that is, that there was no personal malice: but I thought it was 'wilful and malicious,' according to the construction put upon the statute of William 3, as being a trespass committed after notice; and I meant to give the certificate on that ground, if I had power to do so, under the statute of William 3, and that of Victoria taken together. That, therefore, is the question for the court now to determine; and I am of opinion, that, on the true construction of those acts, taken together, I had such power. There would be no question at all upon the matter, but, for the 3d section of the statute of *Victoria. The preamble of that act does not recite the statute of William 3, but only the sta- [*240 tutes of 43 Eliz. c. 6, and 22 & 23 Car. 2, c. 9, which are in part repealed. Then comes this enactment in s. 2—that, if the plaintiff in any action of trespass or trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, &c., shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given on any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall, immediately afterwards, certify on the back of the record, &c., that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought *was wilful and malicious*. Coupling these words with the provisions of the 8 & 9 W. 3, c. 11, s. 4, the only alterations made, are, that the certificate must be given *immediately*, and that the plaintiff is *totally* deprived of costs, instead of obtaining, as under the statute of William 3, no more costs than damages. These are the only alterations made by necessary implication in the statute of William 3; so far, there-

(a) Vide ante, 237, n.

fore, the judge has clearly power to certify, if the trespass were committed after notice, according to the construction put upon the 8 & 9 W. 3. It is clear, from the cases, that, originally, the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice; but the true construction of the statute is that which is stated by the judges in the case of *Good v. Watkins*, 3 East, 495, *241] and which is now put *upon it, namely, that the judge has a discretion in the matter, although that discretion will generally be exercised in favour of the plaintiff, where notice has been given. We are now to consider what is the effect of the 3d section of the statute of Victoria. Very probably, the object of the framer of that clause was, that which has been stated by my lord, namely, to prevent the 4th section of the 8 & 9 W. 3, c. 11, from being inoperative. But, if so, the clause is not happily expressed; for, it applies only to one case provided for by the statute of William 3, namely, that of a written notice served upon, or left at the last reputed or known place of abode of, the defendant; leaving unaffected the case of a verbal notice, or of a notice posted up upon the land. There is some difficulty in putting a construction upon this section. One interpretation of it may be, that, wherever a notice in writing has been given, the plaintiff shall be entitled to full costs without any certificate, although the amount of damages be less than 40s.; but, if so, unless the fact of the notice appeared on the face of the declaration, it would seem that there must be a suggestion upon the record for that purpose, which, according to the recent decision of this court, (a) the defendant would be at liberty to traverse. Or, the meaning may be, that it shall be imperative on the judge to certify where a written notice has been given, whereas, in other cases, it is discretionary. Probably, in order to avoid the inconvenience of the former decisions, the latter is the true construction; but, without deciding that point, it is enough to say that the statute of Victoria leaves the statute of William 3 wholly untouched, except in the particular case mentioned in the 3d section, i. e., of a trespass committed after a written notice; *242] and, therefore, that I was fully *authorized, by the statute of William 3 and that of Victoria, taken together, to grant this certificate." Assuming then, that the proper course for a plaintiff to avail himself of a previous notice not to trespass, to be by entering a suggestion, is this notice within the meaning of the proviso? [WILDE, C. J. You do not dispute that the leaving the stakes on the plaintiff's land was a trespass. *Holmes v. Wilson*, 10 Ad. & E. 503, (b)—where it was held that trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation, and that a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to con-

(a) *Watson v. Quiller*, 11 M. & W. 760.

(b) And see *Hudson v. Nicholson*, 5 M. & W. 437.

tinue such erection,—is a distinct authority that it was.] That cannot now be disputed. This is like the case of an action of trespass for building a house on another man's land, where money has been paid into court, and taken out by the plaintiff in satisfaction of the original trespass, and a second action is brought for the continuing trespass in leaving the house on the plaintiff's land. That brings us to the form of the notice, which is not simply a notice not to trespass, but a notice, that unless the defendant does certain acts, the doing of which would amount to a new trespass, a further action will be brought against him. [WILDE, C. J. Suppose the defendant had stood upon the plaintiff's land, and had received notice to walk off; would not his continuing there after such notice have been a trespass?] That would be a notice to do something the party lawfully might do. [CRESSWELL, J. The plaintiff has recovered damages for a trespass committed on his land, by erecting something thereon. He afterwards gives the defendant a notice, that, unless he removes the *thing so improperly erected, its continuance will be treated as a new trespass, and another action [*243 brought. WILDE, C. J. Can we, sitting in court, doubt that which no man out of court could for a moment hesitate about?] In *Daw v. Hole*, 15 Law J., N. S., Q. B. 32,(a) the judge had refused to certify that the trespass was wilful and malicious, though it was proved at the trial that the defendant had been served with a notice not to trespass. The master, however, notwithstanding the want of a certificate, and without any suggestion of notice on the record, allowed the plaintiff his full costs. The court directed a reviewal of the taxation; saying—"The statute 8 & 4 Vict. c. 24, s. 3, excepts from the operation of that act all cases where notice not to trespass has been proved. The case, therefore, is not within the statute of Victoria, but must be governed by the 8 & 9 W. 3, c. 11, and that has not been complied with, for, under it, there must be a certificate, to entitle the plaintiff to full costs." [WILDE, C. J. The plaintiff has no means of compelling the judge to certify: but, if a suggestion be entered, the defendant has the means of questioning its propriety. I do not see what other course is available. A trespass is not necessarily wilful and malicious, because committed after notice. CRESSWELL, J. What statute do you rely on as depriving the plaintiff of his costs in this case?] The 2d section of the 8 & 4 Vict. c. 24. [CRESSWELL, J. That, by sect. 3, does not apply where there has been notice.] The real question is as to the sufficiency of the notice.

Channell, Serjt., and *Rose*, *contra*, were stopped by the court.

WILDE, C. J. I am of opinion that this rule should be made absolute. By the 22 & 23 Car. 2, c. 9, s. 136, *it was enacted, [*244 "that, in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not

(a) Not reported elsewhere.

find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40s., shall not recover or obtain more costs of suit than the damages so found shall amount unto," &c. Except for that statute, there was nothing at that time to deprive a plaintiff of his full costs, where he had obtained a verdict and damages, however small, in an action for a local trespass. By the next statute, 8 & 9 W. 3, c. 11, s. 4, it was sought to restore to the plaintiff costs in certain cases where the statute of Charles had taken them away: and, accordingly, it was by that section enacted, "that, in all actions of trespass, to be commenced or prosecuted in any of his majesty's courts of record at Westminster, wherein, at the trial of the cause, it shall appear, and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was *wilful and malicious*, the plaintiff shall recover, not only his damages, but his full costs of suit, any former law to the contrary notwithstanding." The effect of that enactment is, to give costs where otherwise the plaintiff would not have been entitled to them; it being evidently intended as a qualification of the provision in the former statute. Repeal the statute of Charles, therefore, and the 8 & 9 W. 3, c. 11, s. 4, becomes nugatory. By the 1st section of the 3 & 4 Vict. c. 24, the statute of Charles is repealed. How, then, stands the law? Why, that a plaintiff who recovers a verdict, for any amount of damages, in an action of trespass, is entitled to full

*245] costs, because the only statute that ever deprived him of costs, is repealed. It is true, the statute 8 & 9 W. 3, c. 11, stands unrepealed; but, to hold that that statute,—which was passed for the purpose of *giving* the plaintiff costs in certain cases, where by the earlier statute they had been taken away,—operates to disentitle a plaintiff, in any case, to costs, would be to give it an effect totally subversive of its intention. The 1st section of the 3 & 4 Vict., c. 24, having repealed the 22 & 23 Car. 2, c. 9, would have left the plaintiff in an action of this sort, who had recovered a verdict with less than 40s. damages, entitled to full costs, but for the 2d section, which enacts, "that, if the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, &c., shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought

to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." It is conceded that this is the only legislative enactment to take away the costs in this case, if they are taken away at all. But that section is not left to operate in its full force; for, the 3d section provides and enacts, "that nothing herein contained shall extend to, or be construed to extend to, deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, &c., *or for entering into any dwellings, &c., in respect of which any notice not to trespass thereon or therein shall have [*246 been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed or known place of abode of, the defendant or defendants in such action or actions." Incorporate the proviso in the 3d section with the 2d, and read the two together, and it will appear that a plaintiff who recovers less damages than 40s. in an action of trespass, or of trespass on the case, is entitled to no costs, unless the judge shall certify that the action was brought to try a right, or that the trespass or grievance in respect of which the action is brought was wilful and malicious,—except where the defendant has had a previous notice not to trespass. Upon the whole, therefore, I think, that, as the law now stands, a plaintiff is entitled as of right to his full costs, in an action of trespass, in respect of a trespass committed after notice, though he recovers less than 40s.

In *Daw v. Hole*, the attention of the Court of Queen's Bench does not seem to have been called to the effect of the 8 & 9 W. 3, c. 11, in connection with the 22 & 23 Car. 2, c. 9. They appear to have thought that costs are *given* only where the judge certifies; not advertng to the circumstance of the only statute depriving the plaintiff of costs in these cases, having been repealed.

The next question is—was the trespass in this case committed after notice? That depends upon whether or not the continuance of the stumps and stakes on the plaintiff's land, after the notice to remove them, was a new trespass. The cases already adverted to, of *Hudson v. Nicholson* and *Holmes v. Wilson*, clearly show that it was. Notwithstanding the ingenious argument of Mr. *Peacock*, there is no doubt whatever on my mind that the notice of the 8th of August, 1845, was a notice not to trespass on the plaintiff's land.

*The only remaining question is, what is the proper course [*247 for the plaintiff to adopt in order to entitle himself to costs. *Non constat* that the notice would appear at the trial. The judge would not be bound to certify; nor would the plaintiff be bound by the absence of a certificate; for, his right to costs does not depend simply upon the judge's certifying, but upon the fact of his having given the defendant a previous notice. Now, the record, which ought to show the

plaintiff's right to costs, is altogether silent as to the fact of a notice having been given. Looking merely at the statute of Victoria, and at the record, we find that the plaintiff has brought an action of trespass, and has recovered less than 40s. damages, and therefore that he is not entitled to costs. The plaintiff, however, claims to be entitled to costs under s. 3. He clearly ought to have an opportunity of asserting his right, and the defendant an opportunity of contesting it; and I see no way in which that can be done, but by entering a suggestion, as proposed.

COLTMAN, J. The cases that have been cited are not at all in conflict with the decision to which we have come. In the case of *Sherwin v. Swindall*, the judge clearly had power to certify, as he did, under the 3 & 4 Vict. c. 24, s. 2. *Daw v. Hole* is not very lucidly reported. The question there seems to have been, whether the master was justified in allowing the plaintiff costs, where he had recovered in trespass less than 40s., there being no certificate under s. 2, and no suggestion of a previous notice under s. 3. Here, I think the plaintiff is clearly entitled to costs, upon a suggestion being entered; and, for the reasons stated by the lord chief justice, I am of opinion that that is the proper course.

CRESSWELL, J. I agree with the rest of the court in thinking that this is a very plain case. *Prima facie*, the plaintiff, having recovered *248] damages, is entitled to costs; *if he is not, it must be by virtue of some statutory enactment. Mr. *Peacock* has very properly admitted that the only statute that can have the effect of depriving the plaintiff of costs in this case, is, the 3 & 4 Vict. c. 24. The 2d section of that statute enacts, that, if the plaintiff, in any action of trespass, or of trespass on the case, shall recover less damages than 40s., he shall be entitled to no costs, unless the judge shall certify on the back of the record that the action was really brought to try a right, or that the trespass or grievance was wilful and malicious. Then comes the 3d section, which provides that nothing in that act shall extend to deprive any plaintiff of costs in any action for a trespass over any lands, &c., in respect of which a notice not to trespass thereon shall have been previously given to the defendant. If this 3d section had enacted that the plaintiff should not be deprived of costs, if it should *appear at the trial* that a previous notice not to trespass had been given, there might have been ground for contending that the judge must certify to entitle the plaintiff to costs. But the notice is not required to appear at the trial. The proper course clearly is, to suggest that fact upon the record, leaving the defendant to traverse it, if so advised.

V. WILLIAMS, J. I am of the same opinion. In order to give any effect to the 3d section of the 3 & 4 Vict. c. 24, it is necessary to adopt one of two constructions, viz. that, in such a case as this, a suggestion shall be entered on the record, to show that the plaintiff has entitled himself to the benefit of that proviso, or that it shall be imperative on

the judge to certify that the trespass is wilful and malicious, where it is committed after notice. The latter would evidently be a much more harsh construction than the former, which, I agree, is the one we ought to adopt.

Rule absolute.

***JOLL and Another v. GEORGE AUGUSTUS FREDERICK** [*249
LOUIS HOWE, commonly called Visct. CURZON. *April 23.*

A plea in abatement of the non-joinder of co-contractors, resident *within* the jurisdiction of the court, alleging that the contract was made with the defendant and such resident co-contractors, and also with other co-contractors resident *without* the jurisdiction of the court, is bad; the statute 3 & 4 W. 4, c. 42, s. 8, requiring the defendant to state in his plea that *all* are resident within the jurisdiction, and to verify the residence of *all* by affidavit.

INDEBITATUS assumpsit, for goods sold and delivered, work and labour, money paid, and money found due upon an account stated.

The defendant prayed judgment of the writ and declaration,^(a) because he said that the said alleged promise in the declaration mentioned, if any such was made by him, was made by him jointly with certain other persons, to wit, A. B., C. D., and E. F., who were still living, and who before and at the time of the commencement of this suit had been, and still were, resident *within* the jurisdiction of this court, and with certain other persons, to wit, G. H., I. K., and L. M., who were still living, and who before and at the time of the commencement of this suit had been, and still were, resident *without* and beyond and out of the jurisdiction of this court, and not by the defendant alone—verification; and that therefore, inasmuch as the said A. B., C. D., &c. &c., were not named in the said writ and declaration, together with the defendant, he the defendant prayed judgment of the said writ and declaration, and that the same might be quashed.

General demurrer, and joinder.

Unthank, in support of the demurrer. The question intended to be raised by this demurrer is, whether a plea of non-joinder of co-contractors, where one or *more of them is or are out of the jurisdiction of the court, is an available plea in abatement. Formerly, it was [*250 necessary to join all the persons who were parties to the contract; and, if any were out of the jurisdiction, the course was, to proceed to outlawry against them. This involved great expense and delay; to obviate which it is provided by the 8th section of the 3 & 4 W. 4, c. 42, "that no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea."^(b) This is, upon

(a) See *Davies v. Thomson*, 14 M. & W. 161; *Whitling v. Des Anges*, 3 Man. Gr. & S. 910.

(b) See *Maybury v. Mudie*, post, Vol. V.

the face of it, a disabling enactment: but the plea is framed upon the assumption that it is also an enabling enactment, entitling the defendant to plead a plea that he could not have pleaded at common law: for, in *Godson v. Good*, 6 Taunt. 587, 2 Marsh. 299, it was held that a plea in abatement,—that the defendant, jointly with sixteen others, contracted,—imports that he contracted jointly with sixteen others, *and no more*; and that, if it appeared that more than the seventeen had contracted, the plea was disproved. This plea, as was observed by GIBBS, C. J., in that case, does not give the plaintiff a better writ; for, the other persons within the jurisdiction, who are alleged to have joined in the contract, if sued thereon, would again have a right to plead in abatement that there are other joint-contractors, who are not named. [CRESWELL, J. You contend, that, where there are several joint-contractors, and one is resident out of the jurisdiction, if one be sued alone, he cannot plead *251] the non-joinder of those who are *within* the jurisdiction, because he cannot *give the plaintiff a better writ against all?] Exactly so. In *Henry v. Goldney*, 15 M. & W. 494, it being suggested in the course of the argument, that a defendant sued upon a joint contract might be precluded from pleading in abatement, since the statute 3 & 4 W. 4, c. 42, by reason of the co-contractor being out of the jurisdiction,—POLLOCK, C. B., observed: “We cannot change the rules of pleading because of that statute. We must suppose that it was passed purposely to hamper pleas in abatement.” And ALDERSON, B., said: “The only effect of the statute is, that *joint* contracts, where one of the contractors is out of the kingdom, become *joint and several*.”(a) And in delivering judgment, the lord chief baron adds: “Before the statute 3 & 4 W. 4, c. 42, the defendant in this case would have pleaded in abatement, the liability of other parties; and if an action were brought against all, he could have pleaded the pendency of the other suit, and so (have) compelled the plaintiff to a discontinuance. Then came the statute, with the clause as to the parties being resident within the jurisdiction of the court; and it is argued that we ought, because of it, to mould the rules of pleading, in order to prevent injustice, or to infer that such were the rules of pleading before the statute, that this plea (b) could have been pleaded, otherwise the statute would work injustice. But I think we cannot adopt that argument, or alter the rules of pleading, merely because the effect of that statute is, in many cases, to take away the *application* of a plea in abatement. In truth, the act was passed without reference *252] to the rules of pleading; and, *when one contracting party is out of the realm, its effect may be, to make contracts joint and several, which, at first, were joint only. I do not see any great mischief

(a) All co-contractors resident *within* the jurisdiction, must, however, still be made co-defendants; and in case of the death of one of them, the contract survives against the rest, wherever resident, and the executors of the deceased contractor cannot be sued.

(b) Which alleged that the contract was made by the defendant jointly with a third party. and that an action was then depending for the same cause against such third party.

in that." [WILDE, C. J. Certainly, the plea gives the plaintiff no better writ, if it leaves him exposed to another plea in abatement.] It would also place a plaintiff in a substantially worse position, by depriving him of the benefit of survivorship as against those co-contractors who were out of the jurisdiction. The objection derives additional force from the 10th section.(a)

Keane, contra. A plea similar to this was pleaded in *Newton v. Stewart*, 15 Law J., N. S., Q. B. 384; and, although the case underwent considerable discussion, this objection was not raised. The validity of the suggestion of the lord chief baron, in *Henry v. Goldney*, is now, for the first time, to be deliberately tested. It is not necessary to contend that the 8th section of the 3 & 4 W. 4, c. 42, is enabling. *Formerly, [*253 if one of two joint-contractors were beyond the jurisdiction, the plaintiff was bound to proceed to outlawry against him, before he went on in the action against the other; and, notwithstanding the outlawry, the action still continued, in all other respects, a joint action: *Fort v. Oliver*, 1 M. & S. 242. It can hardly be contended that the remedy given by the statute is co-extensive with the difficulty pointed out in that case. [WILDE, C. J., referred to *Havelock v. Geddes*, 12 East, 622. The right of the plaintiff to sue must, in all cases, depend upon the particular contract. [V. WILLIAMS, J. I think it is quite clear that the 8th section of the 3 & 4 W. 4, c. 42,—which requires the plea to state that the co-contractor, the non-joinder of whom is complained of, is resident within the jurisdiction of the court,—ousts the party of his plea in abatement, if *all* the co-contractors are not within the jurisdiction.] The language of the 8th section seems to show that the legislature contemplated only the case of *two* joint-contractors. The defendant is bound to state the names of all the persons with whom the contract was made; but it by no means follows that he may not complain of the non-joinder of such of them as are within the jurisdiction. This is not like the case of a joint and several bond given by them, upon which the obligee is bound to sue *all* or *one* of the obligors: *Streetfield v. Halliday*, 3 T. R. 782.(b) The 10th section rather assists this argument; for if the conten-

(a) Which enacts, that, "in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint-contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, (is or) are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, as costs in the cause, against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided, that any such defendant who shall have so pleaded in abatement shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement."

(b) And see 1 Wms. Saund. 291 c.

tion on the other side were correct, there could not be a subsequent plea in abatement. [WILDE, C. J. There might be, if the plaintiffs treated the first as a good plea, and a third defendant afterwards pleaded the non-joinder of a fourth. *Willes, amicus curiæ*, stated that he had, at the sittings after Michaelmas term last, obtained judgment in the Court *254] of Exchequer, in a case of **Moota v. Murray*, upon a demurrer to a similar plea; *Peacock*, contra, having declined to argue in support of the plea.] The court will hardly feel itself bound by a case that was not argued. [WILDE, C. J. The court, having the plea before them, gave judgment against it.]

Unthank was not called upon to reply.

WILDE, C. J. The object of the legislature in making this enactment, was, to relieve a plaintiff from a plea in abatement, by which his proceedings might formerly have been very much embarrassed; but it was no part of their intention in any degree to relax the rules of pleading in favour of the *defendant*. Before the passing of the late statute, the defendant was required, in a plea in abatement, to allege the non-joinder of *all* the co-contractors; and the plea was answered by showing the omission of one; it being the defendant's duty to give the plaintiff a better writ against all those who were jointly liable with him. The statute intended to relieve the plaintiff from the embarrassment of a plea setting up joint-contractors residing without the jurisdiction of the court, and to make no other alteration. Formerly, the affidavit of verification merely stated that the plea was true in substance and in fact. Now, however, the affidavit must give the names and residences of the several parties with convenient certainty—that is, so as to enable the plaintiff to make them defendants in a new action. If, therefore, the defendant cannot give the plaintiff the means of bringing *all* the parties before the court, he cannot have any plea in abatement for non-joinder of co-contractors. Here, the defendant does not do this; but on the contrary, his plea shows that some of the parties cannot be brought into court at all. I am, therefore, of opinion that the plea is bad, and that the plaintiffs are entitled to judgment.

*255] *COLTMAN, J. I am of the same opinion. It appears to me that the statute was designed to remedy an existing inconvenience to which a plaintiff was liable. That inconvenience was, that, unless he sued all the parties to the contract, he ran the risk of having a plea in abatement put upon the record: the effect of which might have been, as in *Havelock v. Geddes*, that, one of the joint-contractors being out of the jurisdiction of the court, the plaintiff must outlaw him before he could proceed with his action against the others. In that case, the plaintiff's proceedings were very much embarrassed by the absent defendant afterwards coming in and reversing the outlawry. The statute intended to prevent a recurrence of that difficulty: and it seems to me to have very effectually done so, by requiring the plea and affidavit to

show that *all* the co-contractors are living within the jurisdiction, and therefore capable of being sued.

CRESSWELL, J. I am entirely of the same opinion.

V. WILLIAMS, J. If this were a good plea, a defendant might, with equal propriety, plead the non-joinder of one joint-contractor, where the residence of another joint-contractor was unknown to him. The statute plainly intended to deprive a defendant of a plea of this sort, unless *all* the co-contractors are within the jurisdiction, and their places of residence can be given in the affidavit of verification, with convenient certainty.

Judgment, *quod respondeat oster*.(a)

(a) Vide Com. Dig. tit. *Abatement*, (L. 14).

*DOE d. ROYLE and Others v. ROE. April 24. [*256

A declaration and notice in ejectment were left with the mother-in-law of the tenant (being herself tenant of part of the premises) on the day before the term, and *the wife of the tenant* on the same day acknowledged that she had received it, and it was then explained to her; but it did not appear that the acknowledgment took place on the premises:—*Held*, insufficient even for a rule nisi.

A declaration and notice in ejectment were left with, and the notice was read and explained to, the mother-in-law of A., the tenant (herself tenant of part of the premises,) the day before the term; the wife of A., on the same day, upon the premises, acknowledged that she had received it, and it was then explained to her; and A., on a subsequent day, admitted that the declaration came to his hands on the day on which it was served:—*Held*, good service.

CHANNEL, Serjt., moved for judgment against the casual ejector.

The affidavit of service, as to Henry Burnham, the tenant in possession of part of the premises, stated the service to have been, by delivering a true copy of the declaration and notice to one Ann Fleming, who represented herself to be the mother-in-law of Burnham, on the 14th of April; that, about an hour afterwards, the deponent was informed by the wife of Burnham, that she, the said wife, had received the said declaration and notice; and that the deponent thereupon explained to the said wife of Burnham, the intent and meaning of the declaration and notice, and of the service thereof.

The cases seem to have destroyed the distinction between admissions by the wife, and admissions by the tenant himself. [CRESSWELL, J. There is nothing to show that the service was on the premises; (a) nor does the acknowledgment appear to have been made on the premises.] In *Doe d. Chaffey v. Roe*, 9 Dowl. P. C. 100, service on the daughter of the tenant in possession, with an acknowledgment *by the wife*, before the term, that the declaration had come to the hands of her husband, was held sufficient for a rule nisi. The only distinction between that case and this, is, that it appeared that the wife had handed the declara-

(a) The affidavit did not state that the service upon Ann Fleming took place on the premises; but it appeared that Ann Fleming was tenant of part of the premises, and as such had been served with a copy of the declaration and notice on her own account.

tion and notice to the husband. In *Doe d. The Governors of the Grey Coat Hospital v. *Roe*, 7 M. & G. 537, 8 Scott, N. R. 274, *257] upon a motion for judgment against the casual ejector, an affidavit of an admission by the wife of the tenant,—that the declaration and notice (which had been left with a female on the premises) had come to *her* hands,—was held sufficient for a rule nisi. [CRESSWELL, J. The court probably thought that an acknowledgment by the wife on the premises was equivalent to a service upon the wife on the premises.] Some difficulty, however, arises from the case of *Doe d. Finch v. Roe*, 5 Dowl. P. C. 225, where LITLEDALE, J., held that an acknowledgment by the tenant, after the commencement of the term, that the declaration has come to his hands, is not sufficient even for a rule nisi, unless the acknowledgment be that he received the declaration before the term,—although the wife acknowledges that it came to *her* hands on the day before the term.

WILDE, C. J. The case last cited is very like the present; the only distinguishing circumstance being, the subsequent acknowledgment by the husband there, that the declaration had come to his hands; which, however, was unavailing, by reason (as we must assume) of its having reference to a day subsequent to the commencement of the term. In *Doe d. The Governors of the Grey-Coat Hospital v. Roe*, the wife was upon the premises when she made the acknowledgment: the court, therefore, treated that as a service on the wife, which, if made upon the premises, is deemed equivalent to a personal service on the tenant. I do not think it desirable to fritter away the rule, which is already sufficiently relaxed, by allowing the tenant to be bound by service on his wife. It appears to me that enough is not shown here to warrant *258] the court in granting even a rule to *show cause, unless we are prepared to go to the extent of substituting the wife, in all cases, for the husband, for the purpose of making admissions, as well as for that of receiving service.

CRESSWELL, J. In *Doe d. Briggs v. Roe*, 2 Tyrwh. 211, 2 C. & J. 202, 1 Dowl. P. C. 312, a declaration and notice having been nailed upon the door of the premises, the tenant's wife called upon the person who had attempted to serve the ejectment, and requested to be informed what she was to do with the paper: he explained it to her, and recommended her to go to the plaintiff's attorney: she replied, that she would see her husband immediately, and would recommend him to do so: and it was held not to be a good service. The service in the present case is not much better than that in *Doe d. Briggs v. Roe*. Rule refused.

Channell, Serjt., on a subsequent day, renewed his motion, upon an affidavit containing the additional facts, that the notice was read and explained to Ann Fleming, that the acknowledgment by the wife was made upon the premises, and that the tenant himself, on the 27th of

April, admitted that the declaration and notice had been received by him on the 14th.

Rule granted.(a)

(a) And see *Doe d. Emsley v. Roe*, (Argent,) 1 M. & G. 840; *Doe d. Gibbard v. Roe*, 3 M. & G. 87, 88, n., 3 Scott, N. R. 363; *Doe d. Shepherd v. Roe*, 10 Law Journ. Q. B. 129; *Doe d. Hope v. Roe*, 3 Man. Gr. & S. 770.

*CAPEL and Others v. JONES. April 28.

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*Warning. J. C. & Co, sharebrokers (meaning the plaintiffs) are informed that the 200 Manchester and Southampton Railway shares bought by J. C., under a false representation of the market, at 8*l*. per share, or 1625*l*., and sanctioned by C. J., (meaning the defendant,) and paid for at the time of purchase, that he forthwith sends them to the Manchester and Southampton committee, with instructions to return the deposit balance to him (meaning the defendant,) unless C. & Co. (meaning the plaintiffs) claim it, or elect to proceed; and, unless C. & Co., (meaning the plaintiffs,) within the present year, arrange to return the 1625*l*. to him, (meaning the defendant,) also the 7*l*. expenses incurred for advertisement and solicitor to procure proof of having paid C. & Co. (meaning the plaintiffs) 1600*l*. and 25*l*., commission, C. J. (meaning the plaintiff) will adopt legal measures. The amount will be taken by instalments, on security being deposited with any bankers but those who recommended C. & Co."—

Held, that, in the absence of a colloquium pointing the above, or an averment of special damage, the publication was not actionable.

CASE, for a libel. The declaration stated, that whereas, before and at the time of the committing of the grievances by the defendant thereafter mentioned, the plaintiffs used, exercised, and carried on the business and profession of stock-brokers and share-brokers, in the city of London, in co-partnership together, and had always conducted themselves, in their said business and profession, in an upright, fair and honourable manner, and were honestly acquiring thereby great gains and profits in their said business and profession; that, before the time of the committing of the grievances by the defendant, as thereafter mentioned, the plaintiffs had been retained and employed by the defendant in the way of their said business and profession, for certain commission and reward to be therefore paid by the defendant to the plaintiffs in that behalf, to buy for and on account of the defendant, divers, to wit, two hundred shares, or scrip-certificates, then saleable in the city of London, in a certain undertaking then commonly called and known by the name of The Manchester and Southampton Railway; that the plaintiffs had bought the same, in the way of their said business and profession, for the defendant, and, in so buying, the plaintiffs had *acted and conducted themselves towards the defendant in an upright, fair, honourable, and business-like manner,—of all which the defendant, before and at the time of the committing of the grievances thereafter mentioned, had notice: nevertheless, the defendant, well knowing the premises, but wickedly and maliciously intending to injure the plaintiffs in the way of their said business and profession, and to cause it to be suspected and believed that the plaintiffs had conducted themselves, in the way of their said business and profession, in

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the said purchase of the said shares, or scrip-certificates, for the defendant, in a deceitful, unfair, dishonourable, and unbusiness-like manner towards the defendant, and thereby to prejudice and ruin the plaintiffs in the way of their said business and profession, theretofore, to wit, on the 22d of October, 1846, at London, did falsely, wickedly, and maliciously compose and publish, and cause and procure to be composed and published, in a certain newspaper called *The Daily News*, of and concerning the plaintiffs in the way of their said business and profession, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, defamatory, and libellous matters following, of and concerning the plaintiffs, and of and concerning them in relation to their said business and profession, and of and concerning their purchase for the defendant of the said shares, or scrip-certificates, that is to say—"Warning. James Capel, Norbury, Trotter, & Co., share-brokers (thereby meaning the plaintiffs) are informed that the two hundred Manchester and Southampton Railway shares bought by J. C., (meaning the said shares so bought by the plaintiffs as aforesaid,) under a false representation of the market, at 8*l.* per share, or 1625*l.*, and sanctioned by Charles Jones, (meaning the defendant,) and paid for at the time of purchase, that he forthwith sends them to the

*261] Manchester and Southampton committee, with *instructions to return the deposit balance to him, (meaning the defendant,) unless Capel & Co. (meaning the plaintiffs) claim it, or elect to proceed; and, unless Capel & Co., (meaning the plaintiffs,) within the present year, arrange to return the 1625*l.* to him, (meaning the defendant,) also the 7*l.* expenses incurred for advertisement and solicitor to procure proof of having paid Capel & Co., (meaning the plaintiffs,) 1600*l.*, and 25*l.* commission, C. J. (meaning the plaintiff) will adopt legal measures. The amount will be taken by instalments, on security being deposited with any bankers but those who recommended Capel & Co." (meaning the plaintiffs:) That, by means of the committing of the said grievances by the defendant as aforesaid, the plaintiffs had been and were greatly injured in their good name, fame, and credit, and in their said business and profession, and brought into public disgrace and contempt, &c.

To this declaration the defendant demurred specially, assigning for causes, that it did not on the face of it disclose in any sufficient manner a good and clear cause of action;—that the supposed libellous matter set forth therein did not, *per se*, amount to a libel upon the plaintiffs, and that, if any thing libellous was meant to be conveyed by it, the effect and application of it should have been shown by innuendo and averment;—that there was nothing whatever upon the face of the declaration, to show that it could have had the import or meaning sought to be affixed to it by the plaintiffs;—that the word "warning," in the commencement of the supposed libellous matter, was insensible and unintelligible by itself, and that the plaintiffs should have introduced an

innuendo, or some word of explanation, in order to enable the court to determine the parties to whom warning (if by that term was to be understood, notice or caution) was to be given, whether to the public generally, or to the plaintiffs in particular;—that, as the declaration stood, it was impossible to say with certainty what was the *meaning of the word “warning;”—that the declaration should not [262 have been left doubtful on this point;—that it ought to have been distinctly stated and shown who made, or who were or was charged or supposed to have made, the false representation mentioned in the alleged libel;—that there was nothing in the alleged libel to show that the making of the said false representation was imputed to the plaintiffs, and, if not, there was nothing libellous in the matter alleged and supposed by the declaration to be libellous;—that the declaration should have distinctly and more clearly shown that it was intended by the alleged libellous matter, to charge the plaintiffs with having made such false representation;—that it could not be collected, with the requisite or any certainty, who was or were the person or persons supposed and charged to have been guilty of the same;—that, for aught that appeared to the contrary, the conduct of the plaintiffs had been, and was admitted by the alleged libellous matter to have been, without reproach;—that it was impossible to collect, from the declaration, with any certainty, what was the nature of the charge supposed to have been conveyed by the publication in question, nor wherein the supposed libel consisted;—and that, in this respect, the declaration should have been more specific, so as to admit of the defendant’s meeting and justifying the alleged libel, &c.

Joinder in demurrer.

T. Jones, (with whom was *Talfourd*, Serjt.,) in support of the demurrer. The matter complained of is not libellous. It contains no imputation whatever on the plaintiffs. The advertiser says that he has been defrauded by somebody. He does not, however, charge the plaintiffs with fraud, but rather the vendors of the shares. [CRESSWELL, J. Does the alleged libel impute negligence, or fraud, or falsehood?] Neither: or, at all events, it is uncertain, on the face of the declaration, which of them is meant.

**Channell*, Serjt., (with whom was *Sir John Bayley*,) contra. [263 The publication in question is clearly a libel on the plaintiffs in the way of their business. The very first word shows the character of the advertisement. Admitting that it may be doubtful whether the libel does not charge the seller of the shares, rather than the plaintiffs, with having practised a fraud upon the defendant, still it clearly charges them with negligence and want of care and skill in the business of share-brokers. [WILDE, C. J. Why do they not say so?] The words being libellous in themselves, no innuendo was necessary to point them. No one can read this advertisement without seeing that a very serious re-

flection on the plaintiffs was intended. [WILDE, C. J. There is nothing on the face of the declaration whence we can necessarily imply a charge even of negligence in the plaintiffs.] It was the very object of the defendant to conceal the precise imputation he intended to convey. [WILDE, C. J. I am wholly unable to extract from the statement of the alleged libel any thing approaching to a cause of action. The whole seems to amount to no more than—"I do not like you, Dr. Fell." That it is a piece of impertinence, is not enough to entitle the plaintiffs to maintain an action for it. No doubt, the intention of the defendant was, to vex and annoy the plaintiffs: but, what is there here to bring them into disrepute as cautious and efficient men of business? I am utterly unable to discover any imputation on their character. What right have they to ask the court to draw an inference which they have not ventured to draw for themselves? If the court can extract venom from the publication, why may not the plaintiffs?] The libel is so darkly expressed that it is difficult to affix a precise meaning to it: it clearly imputes to the plaintiffs either fraud, or negligence, or some other improper conduct in their business.

*264] *WILDE, C. J. In reading this libel, the court considers itself bound so to deal with it as it would be dealt with if this were a motion to arrest the judgment, and to see if there is in it any thing which, by reasonable intendment, conveys an imputation upon the plaintiffs, either in their moral character, (a) or in the conduct of their business. It is somewhat remarkable that the plaintiffs have not ventured to aver that the alleged libel, or any part of it, is calculated to injure the plaintiffs in their calling of stock and share-brokers: and no special damage is alleged. In all these cases, if by any reasonable intendment a jury could infer that the publication complained of reflects upon the moral conduct (a) or the professional reputation of the plaintiff, it is the duty of the court to send the matter before them. But the instances are by no means rare, of judgment being arrested when the court has thought that, by no reasonable intendment, could the libel bear the construction put upon it by the innuendoes. Of this class is the case of *Hearne v. Stowell*, 12 Ad. & E. 719. There, the declaration stated that the plaintiff was a Roman Catholic priest, and priest of a chapel named, and that the defendant, intending to injure him in his offices, published of him, in those offices, a libel, which was set out. The alleged libel contained an account of a Roman Catholic having been seen performing a penance, which was suggested to be of a degrading kind, and added that the party performing the penance said that his priest would not administer the sacrament to him till he had performed it, and that his priest was the plaintiff. The declaration also set forth

(a) A publication attacking the moral conduct of the plaintiffs would entitle them to separate actions; but, to sustain a joint action in respect of such attacks, special damage to the firm must be alleged.

certain comments of the defendant, accompanying the publication, and in which the Roman Catholic discipline was attacked. The libel was not otherwise connected with the *plaintiff: nor were there any allegations showing how the enjoining of such a penance would [*265 affect the character of a Roman Catholic priest. The court arrested the judgment,—holding that the publication was not, on the face of it, libellous; and refusing, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of an injury to the plaintiff which the declaration did not show, though some evidence to that purpose was in fact given. In the absence, therefore, of any colloquium or innuendo giving to this libel a construction or meaning injurious to the character of the plaintiffs, we must endeavour to extract from the words themselves something that will sustain the declaration. The alleged libel commences with the word “warning.” That *per se* amounts to nothing. It then goes on to state that the plaintiffs bought certain railway shares, under a false representation of the market at a certain price. Does that necessarily impute to the plaintiffs want of skill or dishonesty? The words that follow—“and sanctioned by Charles Jones”—tend to make the statement more equivocal, and are, I think, altogether inconsistent with any imputation on the plaintiffs. The writer then proceeds to state that he will forthwith send them (*i. e.* the shares) to the Manchester and Southampton committee, and claim a return of the deposit paid; not stating on what ground; and it by no means follows that it must necessarily be on a ground reflecting on the character or conduct of the plaintiffs. It is not averred that the plaintiffs stood in any such relation to the company as to make them responsible for any misrepresentation as to the value of the shares, to which they are not shown to be parties. The next sentence of the advertisement amounts to a mere threat to take legal proceedings against Messrs. Capel & Co., unless they would arrange to return the defendant the sum paid by him as the price of the shares. That clearly is not the *subject-matter of an action. In the absence of any explanation on the plaintiffs’ part, I am unable [*266 to discover any thing that looks like an imputation on them. The only part that seems at all doubtful, is that which proposes to take the amount by instalments, “on security being deposited with any bankers but those who recommended Capel & Co.” Possibly the writer may by this mean to insinuate that the plaintiffs are unable to pay something for which they are liable. But, in the absence of any statement referring to any transaction out of which such a liability could arise, I cannot infer that the defendant intended to impute insolvency to the plaintiffs. And this appears to me to be the only passage calculated to induce a moment’s hesitation. The concluding words seem rather to cast a reflection on the bankers who recommended the plaintiffs to the defendant. Upon the ground, therefore, that there is nothing in the

alleged libel that can, by any fair and reasonable intendment from the words themselves, be construed as reflecting upon the characters or capacity or conduct of the plaintiffs, I think the defendant is entitled to judgment.

COLTMAN, J. I am of the same opinion. There clearly is nothing disclosed in the declaration that can properly be the subject of an action. The alleged libel neither holds up the plaintiffs to ridicule,^(a) nor imputes to them any criminality or unskilfulness in their business. It is a hasty statement of an angry man who has sustained a severe loss: but it is not alleged that that loss was occasioned by the fraud or negligence of the plaintiffs.

CRESSWELL, J. The plaintiffs have not attempted, by any colloquium or innuendo, to give a particular application to the language used in the alleged libel, as was done in *Goldstein v. Foss*, 6 B. & C. 154, 9 D. & R. 197, 4 Bingh. 489, 1 M. & P. 402, 2 Y. & J. 146. We must, *267] therefore, *read the words in their ordinary sense; and, so reading them, it is quite impossible to say, with any reasonable certainty, that they contain any libellous imputation on the plaintiffs.

V. WILLIAMS, J. I am of the same opinion. It is not enough to show that the alleged libel has a malicious or calumnious tendency: it must be distinctly shown what the particular imputation is, according to the doctrine in *Hearne v. Stowell*. Judgment for the defendant.

(a) *Suprà*, 264, n.

DOE d. HARRISON, Clerk, v. HAMPSON. (b)

The presumption of law, that slips of waste land adjoining a highway belong to the owner of the adjoining enclosed land, may be rebutted by evidence tending to raise a contrary presumption.

In an action by a rector, to recover a slip of land lying between the glebe and a highway, in order to rebut the presumption of ownership arising from contiguity, it was proved that the defendant and those under whom he claimed had occupied the spot in question for more than forty years, and during four or five successive incumbencies, without interruption and that there were slips of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector:—*Held*, that, the whole case on both sides resting on presumption, it was properly left to the jury to say whether or not the evidence given on the defendant's part rebutted the presumption of law on which the plaintiff's case rested.

THIS was an action of ejectment, brought by the rector of the parish of Thorn Falcon, otherwise Thorn Parva, in the county of Somerset, to recover possession of a small piece of land with a cottage and out-houses thereon, lying by the side of the turnpike-road leading from Hatch Beauchamp to Taunton, which he claimed as part of his glebe.

The cause was tried before ERLE, J., at the Taunton spring assizes, 1846, when it appeared in evidence that the lessor of the plaintiff had

(b) This case was decided in *Trinity* term, 1846.

glebe land lying on each *side of the road in question, and that the fence of such glebe land was parallel to the road, and a few yards from it. The piece of land sought to be recovered was part of that which was between the fence of the glebe land and the road. [*268]

On the part of the defendant, it was proved, that, at the earliest period to which the evidence extended, viz. forty-five years ago, the piece of land lying between the fence of the glebe and the road was open and unenclosed; but, at each end of it, there was at that time a small piece, also lying between the glebe and the road, enclosed, in the occupation of persons who were not shown to derive title under the incumbent of Thorn Falcon; and no evidence was given of the time when such enclosures were made. Part of the piece of land for which the action was brought was enclosed forty years ago by one Hurcott, who sold it to another person, who increased the size of the enclosure. From this person, the defendant bought the enclosure, and he had enjoyed it for thirty-seven years. During the forty years, there had been five rectors of Thorn Falcon.

There was no evidence to show that any of the acts of ownership exercised by the defendant, or those under whom he claimed, were referable to any authority derived from the lord of the manor.(a)

For the plaintiff, it was contended, that it was a presumption of law, that the slip of land lying between the fence of the glebe and the road, belonged to the rector as part of his glebe, and that the occupation of it by other persons for forty years gave no title to the occupiers, and consequently did not defeat the title by legal presumption arising from the situation of the land: and the 3 & 4 W. 4, c. 27, s. 29,(b) was *referred to, as was also the case of *Doe d. Pring v. Pearsey*, [269] 7 B. & C. 304, 9 D. & R. 908.(c)

(a) The contest was, in fact, between the lord of the manor and the rector.

(b) Which enacts "that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued,—that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and, if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years: and, after the said 31st of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period."

(c) That case was decided upon the ground that the customary tenement must be presumed to have been created *before* the dedication of the road to the public. No question was raised as to the propriety of presuming that the tenant had been guilty of voluntary, or, at least, permissive waste, in destroying *pro tanto* the copyhold estate. If the dedication of a highway must be presumed to be posterior to the creation of the copyhold through which it runs, it seems to follow, that, upon the escheat of such a copyhold, the lord may stop up the highway, although it may have been enjoyed by the public from the days of King Stephen; as the lord was not bound to enter for the forfeiture.

The learned judge held, that, the claim of the lessor of the plaintiff resting on presumption, the evidence adduced by the defendant tended to rebut the presumption; and he left the whole to the jury, who returned a verdict for the defendant.

Channell, Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground that there was no evidence which ought to have been submitted to the jury, for the defendant. [ERLE, J. The plaintiff relied on the presumption of law. In order to rebut that, the *270] *defendant showed forty-three years' possession by himself and those under whom he claimed, three conveyances for valuable consideration in the mean time, and four or five successive incumbrances, during which the right was never disputed. There was no evidence that the slip of land in question ever was part of the glebe. I left the whole to the jury; and they came to the conclusion that the presumption of law did not arise.] The learned serjeant cited *Rex v. The Inhabitants of Edmonton*, 1 M. & Rob. 24.

Dowling, Serjt., (with whom was *M. Smith*.) showed cause. The general presumption undoubtedly is, that waste land abutting on a turnpike-road belongs to the owner of the adjoining enclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor: *Doe d. Pring v. Pearsey*, 7 B. & C. 304, 9 D. & R. 908; *The King v. The Inhabitants of Hatfield*, 4 Ad. & E. 156. It is a *præsumptio juris*, not *de jure*, which may always be rebutted by evidence to the contrary. Thus, in *Grose v. West*, 7 Taunt. 39, (a) it was held, that, if the strip of land communicate with open commons, or other larger portions of land, the presumption is either altogether destroyed, or considerably narrowed; for, that the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them. *Doe d. Barrett v. Kemp*, 7 Bingh. 332, 5 M. & P. 173, S. C. in error, 2 N. C. 102, 2 Scott, 9, recognises the same principle. So in *Steel v. Prickett*, 2 Stark. N. P. C. 463, ABBOTT, C. J., lays down the rule as well established, that land under such circumstances is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor; adding that *271] "a presumption prevails only *so long as proof to the contrary is wanting." *Headlam v. Headley*, Holt, N. P. C. 463, is to the same effect. (b) Before enclosure, the land may have belonged either to the owner of the adjoining land, to the lord of the manor, or to a third person. In the absence of direct evidence that it ever was part of the glebe, the 29th section of the 3 & 4 W. 4, c. 27, cannot affect the question. If there was *any* evidence for the defendant, the direction was right: and the learned judge was bound to leave the whole case to the jury.

(a) And see *Jayne v. Price*, 5 Taunt. 326, 1 Marsh. 68; *Doe d. Carr v. Billyard*, 3 M. & R. 111.

(b) And see *Scoones v. Morrell*, 1 Beavan, 251.

Channell, Serjt., (with whom was *Fitzherbert*.) in support of the rule. The question was not correctly dealt with at the trial. The presumption as to waste land lying between the highway and ancient enclosed lands, is, that it belongs to the owner of the adjoining lands; and this presumption is strengthened if the lands on both sides belong to the same person. The reason is very accurately given by ABBOTT, C. J., in *Steel v. Prickett*. There, the strip was claimed by the lord of the manor: and it is important to bear in mind, that the dispute has usually been between the lord of the manor and the owner of the adjoining land. (a) His lordship says: "In some of the more ancient books of law, a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but, as far as my own experience goes,—and I have heard the opinions of many learned judges on the subject,—it has uniformly been laid down, that land, under such circumstances, is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor; but a presumption prevails only so long as proof to the contrary is wanting." * * *

"In remote and ancient times, when roads were frequently made through unenclosed lands, and when the same labour and expense *was [*272 not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public, when the road was out of repair, might pass along the land by the side of the road. This right, on the part of the public, was attended with this consequence, that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person was the owner of the land on both sides, and enclosed both sides, he was bound to repair the whole of the road; if he enclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and, where there was an ancient enclosure on one side, and the owner of lands enclosed on the other, he was bound to repair the whole. Hence, it followed as a natural consequence, that, when a person enclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads; that the object was, to leave a sufficiency of land for passage by the side of a road, when it was out of repair, is the general presumption of law, but this presumption is capable of being rebutted." And BAYLEY, J., adopts the same view in *Doe d. Pring v. Pearsey*; as did this court in *Doe d. Barrett v. Kemp*. Where it is shown that the road is made through a manor, and evidence is given of acts of ownership exercised over the spot in question by the lord, the presumption is raised that the road was ori-

(a) Vide *supra*, 268 (a).

ginally made by the lord over the waste land of the manor. But, where no manorial rights intervene, evidence much more cogent than that adduced here is required to displace the presumptive right of the owner *273] of the adjoining enclosed land; it must at least be *evidence tending to show that some one else originally made the road.

[MAULE, J. The question is, whether there was any evidence to go to the jury, against the presumption. *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court. After stating the facts, *ut ante*, 267, 268, the learned judge proceeded as follows:—The three surviving judges who heard the argument have come to the conclusion that the rule must be discharged.

It is not necessary to determine what would have been the result, if the evidence had shown, that, at the earliest period to which it applied, there was glebe land enclosed, and a slip of land lying unenclosed between that glebe and the road, without any circumstance then existing which tended to rebut the presumption that the slip belonged to the owner of the enclosed land; for, the evidence showed, that, at that time, there were two pieces of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector; which fact was, undoubtedly, evidence tending to raise a presumption that the land lying between the enclosed glebe and the road was not part of the glebe; and the adverse occupation of the part in question in the cause, for forty years, was evidence strengthening that presumption. The whole, therefore, rested in presumption on both sides. The lessor of the plaintiff, on the one hand, did not prove title, but merely facts from which a title might be presumed: and the defendant, on the other hand, elicited from the witness called by the lessor of the plaintiff, evidence of other facts tending to rebut that presumption.

It was, therefore, incumbent on the learned judge to leave the whole to the jury; and there is no ground for granting a new trial.

Rule discharged.

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*FEARN v. COCHRANE.

To a count on a bill of exchange, the defendant pleaded, that, after the bill became due, he made a promissory note payable to the plaintiff's order on demand, and delivered the same to the plaintiff, who took and received the same, "for and on account of" the bill, and the causes of action in respect thereof; and that afterwards he delivered to the plaintiff a warrant of attorney, and that the plaintiff accepted and received the same, in full satisfaction and discharge of the said note, and of all causes of action in respect thereof, and of the causes of action in the count mentioned: *Held*, that the plea was not double. *Quære*, whether it was bad, as being an argumentative plea of payment.

ASSUMPSIT. The first count of the declaration charged the defendant as the acceptor of a bill of exchange for 732*l.* 13*s.*, drawn by the plaintiff on the 14th of December, 1839, payable two months after date.

The second count was on a bill for 150*l.*, drawn by the plaintiff on the 4th of December, 1839, and accepted by the defendant, payable two months after date. The third count was on a bill for 70*l.*, drawn by the plaintiff on the 9th of January, 1840, and accepted by the defendant, payable two months after date. The declaration also contained a count for money found due upon an account stated, and a general breach.

Seventh plea, to the first count, that, after, the making and acceptance of the bill of exchange in that count mentioned, as therein alleged, and after the same became due and payable according to the tenor and effect thereof, and before the commencement of the suit, to wit, on the 1st of April, 1840, *the defendant* made his certain note in writing, bearing date, to wit, the day and year last aforesaid, and thereby promised to pay to *the plaintiff*, or his order, on demand, 1050*l.*, and then delivered the same to the plaintiff, and who then took and received the same *for and on account* of the last-mentioned bill of exchange, and the causes of action in respect thereof in the said first count mentioned; that thereupon, afterwards, and after the making and delivery *by the defendant to the plaintiff* of the promissory *note in the plea mentioned, and before the commencement of the suit, to wit, on the [275] 9th of May, 1842, it was agreed by and between the plaintiff and defendant and Thomas, Earl of Dundonald, that the said Thomas, Earl of Dundonald, should sign and seal, and as his act and deed deliver to the plaintiff, in full satisfaction and discharge of the said promissory note in this plea mentioned, and of all causes of action in respect thereof, *and* of the causes of action in the first count mentioned, a certain deed or instrument, called a warrant of attorney to confess a judgment, bearing date the day and year last aforesaid, in the form and to the effect, and with the defeasance thereunder written hereinafter next mentioned respectively, and that the plaintiff should accept and receive the same of and from the said Thomas, Earl of Dundonald, in full satisfaction and discharge as last aforesaid: that thereupon, afterwards, and before the commencement of the suit, to wit, on the day and year last aforesaid, in pursuance of the said agreement, and according to the true intent and meaning thereof, the said Thomas, Earl of Dundonald, signed and sealed, and as his act and deed delivered, to the plaintiff, in full satisfaction and discharge of the said promissory note in this plea mentioned, and of all causes of action in respect thereof, and of the causes of action in the said first count mentioned, a warrant of attorney to confess judgment, bearing date the day and year last aforesaid, directed to R. J. H. and W. M., attorney's of her majesty's Court of Queen's Bench at Westminster, jointly and severally, and to any other attorney of the same court, and thereby desired and authorized them, the last-named attorneys, or any one of them, or any other attorney of the Court of Queen's Bench, to appear for the said Thomas, Earl of Dundonald, as

of Trinity term then next, or any other subsequent term, and then and
*276] there to receive a declaration *for the said Thomas, Earl of
Dundonald, in an action of debt for 2700*l.*, at the suit of the
now plaintiff, his executors or administrators, and thereupon to confess
the same action, or else to suffer judgment by *nil dicit*, or otherwise, to
pass against the said Thomas, Earl of Dundonald, in the same action,
and to be forthwith entered up against the said Thomas, Earl of Dun-
donald, of record of the last-mentioned court, for the said sum of 2700*l.*,
together with costs of suit; and, after the said judgment should be en-
tered up as aforesaid, for the said Thomas, Earl of Dundonald, and as
his act and deed to sign, seal, and execute a good and sufficient release
in the law to the plaintiff, his heirs, executors, and administrators, of all
and all manner of error and errors, writ or writs of error, and all benefit
and advantage thereof, and all misprision of error and errors, defects and
imperfections whatsoever had, made, committed, done, or suffered, or
to be had, &c., in and about, touching, or concerning the aforesaid
judgment, or in, about, touching, or concerning any writ, warrant, pro-
cess, declaration, plea, entry, or other proceedings whatsoever of or any
way concerning the same; that, before and at the time when the said
Thomas, Earl of Dundonald, signed, sealed, and as his act and deed
delivered, the said warrant of attorney as aforesaid, there was present
at the said execution thereof one J. P. Beavan, an attorney of one of
the superior courts, to wit, &c., on behalf of the said Thomas, Earl of
Dundonald, expressly named by him, and attending at his request, to
inform him of the nature and effect of such warrant of attorney, before
the same was executed; and the said J. P. Beavan then informed the
said Thomas, Earl of Dundonald, of the nature and effect of the said
warrant of attorney, before the same was so executed as aforesaid, and
then subscribed his name as a witness to the due execution thereof, and
*277] thereby then declared *himself attorney for the said Thomas,
Earl of Dundonald, so executing the same as aforesaid, and
stated that he subscribed as such attorney: that, by a memorandum of
defeasance to the said warrant of attorney thereunder then written, and
signed by the said Thomas, Earl of Dundonald, it was declared that the
said warrant of attorney was given to secure the payment, from the
said Thomas, Earl of Dundonald, to the now plaintiff, of the sum of
1850*l.*, with interest, on the 1st of January, 1843, and that it was thereby
agreed by and between the said parties thereto, that no judgment should
be signed on the said warrant of attorney, and no action or execution
or other process or proceedings, should be commenced, sued out, or pro-
secuted against the said Thomas, Earl of Dundonald, his heirs, execu-
tors, or administrators, against his lands, goods, or chattels, until de-
fault should happen to be made in payment of the said sum of 1850*l.*,
with interest as aforesaid, and that it should not, in the event of the now
plaintiff delaying to sue out execution on the said judgment after a year

or more from the signing of such judgment, be necessary for the now plaintiff, his heirs, executors, or administrators, to revive the said judgment by *scire facias* or otherwise, and that execution might issue without any such writ or other proceedings being taken, any rule of law to the contrary notwithstanding: that the plaintiff then, to wit, on the said 9th of May, 1842, and before the commencement of this suit, accepted and received the said warrant of attorney, with the said defeasance thereunder written, of and from the said Thomas, Earl of Dundonald, in such full satisfaction and discharge of the said promissory note in this plea mentioned, and of all causes of action in respect thereof, and of the said cause of action in the said first count mentioned—verification.

Similar pleas to the second and third counts.

To each of these pleas the plaintiff demurred specially, *as- [*278
signing for causes, that the plea was double, in this, to wit, that it alleged that the defendant delivered to the plaintiff, and that the plaintiff accepted of the defendant, a promissory note payable to the order of the plaintiff, for and on account of the bill of exchange, which, if well pleaded, is one answer to the count, and also alleged a satisfaction and discharge of the same causes of action, by the making and delivery of a warrant of attorney, which, if well pleaded, is another and second answer to the count; that the accord and satisfaction is not pleaded with sufficient certainty, since it does not appear within what time the Earl of Dundonald was to execute the warrant of attorney, or that he did execute such warrant of attorney within a proper and reasonable time after the making of the accord; and that the plea was uncertain and ambiguous, inasmuch as it was doubtful whether the defendant rested his defence on the performance of the accord, or on the acceptance by the plaintiff of the said warrant of attorney.

Joinder in demurrer.

T. Jones, in support of the demurrer. The plea is clearly double. The delivery of the note to the plaintiff for and on account of the bill, according to *Kearslake v. Morgan*, 5 T. R. 513, and *Mercer v. Cheese*, 4 M. & G. 804, 5 Scott, N. R. 664, 2 Dowl. N. S. 619, *prima facie* imports satisfaction; and the delivery of the warrant of attorney, "in full satisfaction and discharge of the said promissory note, &c.," presents a second full answer to the action.

Channell, Serjt., (with whom was *C. D. Bevan*,) *contra*. The first part of the plea does not afford even a *prima facie* answer to the action: the delivery of the note did not operate a satisfaction of the original debt, or even *as a suspension of the remedy. In *Kearslake v. Morgan*, [*279
the plaintiff had the security of a third party, that of the maker of the note. In *Mercer v. Cheese* the plea alleged that the defendants made the promises in the declaration, jointly with one Morris, and that, after the making of the said promises by the defendants and Morris, and before the commencement of the suit, the plaintiff, for and on account of

the sum as to which the plea was pleaded, and the promises of the defendants and Morris in respect thereof, made and drew his bill of exchange in writing, and directed the same to Morris, and thereby required him, three months after the date thereof, to pay to the plaintiff's order 150*l.*, and that Morris, for and on account of the said sum of 150*l.*, and the said promises of him, Morris, and the defendants, in respect thereof; then accepted the said bill so drawn by the plaintiff as aforesaid, and then delivered the same to the plaintiff, who then took and received the same of and from Morris *for and on account* of the said sum of 150*l.*, and the said promises of the defendants and Morris in respect thereof: and it was held, on special demurrer, that the plea afforded a *prima facie* answer to the action, which the plaintiff might rebut by showing that the bill remained in his hands unpaid. The ground of the opinion intimated by the court there was, that, if the note remained in the plaintiff's hands unpaid, that being a matter more peculiarly within his knowledge, he was bound to show it by his replication. That case was not much argued; and it seems to be at variance with the subsequent decision of the Court of Exchequer in *Price v. Price*, 16 Law Journ., N. S., Exch. 99. There, to debt by the payee against the maker of a promissory note, payable at six months, for money lent, interest, and on an account stated, the defendant pleaded, as to 100*l.*, parcel of the moneys in the second, third, and last counts, that the defendant, before

*280] the commencement of the suit, made his promissory note for the payment to the plaintiff's order of 100*l.*, six months after date, and that the defendant then delivered the note to the plaintiff, who then took and received the same for and on account of 100*l.*: to this the plaintiff replied, that the period of six months specified in the note, expired before the commencement of the suit, and that the promissory note became, before the commencement of the suit, due and payable, yet that the defendant had not paid the money therein specified: and it was held that the plea afforded no answer to the declaration, inasmuch as it did not aver that the note was still running, or that it had been endorsed over by the plaintiff. "If," says PARKE, B., "the instrument is made payable to a third person, as in *Richardson v. Rickman*, 5 T. R. 517, n., or is made by a third person, as in the case of *Kearslake v. Morgan*, the plea, stating the delivery and acceptance of the negotiable instrument, is a sufficient answer, in the first instance. If the plaintiff had taken up the bill, in the former case, or presented the note at maturity, in the latter, to the maker, and given due notice of dishonour to the defendant, these facts would have formed the proper subject of a replication. But, if the plea state no more than that a negotiable note is given for and on account of the debt, by which the defendant promised to pay the plaintiff, or order, a sum of money, and does not state the note to be still running, (which is the case,) there seems to us to be no *prima facie* answer. The remedy is not suspended

at the time of action brought, so that there is no defence on that ground; and, according to the principles of pleading, it is to be intended that the note remains as it was, and that no order was made by the plaintiff for the payment to a third person, as it is not so averred; and, therefore, for *any thing stated in the plea, the note remains overdue in the hands of the plaintiff: so that the suspension of [*281 his right of action for the original debt is at an end, and he may recover the amount, no presentment or notice of dishonour being necessary in his case; and therefore such a plea is no answer to the action. In a declaration on a note payable to order, it never is stated that no order was made, but it is presumed that there is none until the defendant pleads it; though it is true in both cases that the fact whether an endorsement has been made or not, lies more in the plaintiff's knowledge than the defendant's. But, in the case of a declaration, the rule that a party is to plead facts within his own knowledge, gives way to the rule that things are to be presumed to continue in the same state till the contrary appears. To make *this* plea, therefore, good, it should be averred that the note was not in the plaintiff's hands, that is, that it was endorsed over before the action brought." [WILDE, C. J. No doubt, the plea would present a much more substantial defence if it alleged that the note was endorsed over to a third person.] The defendant must allege in his plea enough to make it a good answer to the action. Where the security was not originally taken in satisfaction and discharge of the debt, but, by reason of subsequent circumstances, it does operate as a discharge, the plea should allege those circumstances. *Price v. Price* is a distinct authority to show that that is matter which must come from the defendant, and not from the plaintiff. In *Richardson v. Rickman*, the bill was given *by*, and in *Kearslake v. Morgan* *to*, a third party: here, the note is stated to have been given *by* the defendant *to* the plaintiff; and the only difference between this case and *Price v. Price*, is, that here the note was payable *on demand*, there, six months after date. [WILDE, C. J. With this additional circumstance, that, here the note is, by the giving of the warrant of *attorney, treated as being still in the hands of the plaintiff.] Precisely so. [*282 The first part of the plea, therefore, clearly does not show any continuing suspension of the defendant's liability in respect of the original debt; neither does it amount to a defence in the way supposed in *Richardson v. Rickman*, *Kearslake v. Morgan*, and *Mercer v. Cheese*; nor does it, according to the considered judgment of the Court of Exchequer in the case of *Price v. Price*, afford even a *prima facie* answer.

Assuming, however, that the delivery and acceptance of the note, under the circumstances stated, would afford a *prima facie* defence to the action, it does not render the plea double, inasmuch as the giving of the note is merely alleged by way of inducement to the subsequent part of the plea, which exhibits the real defence. In *Stephen* on

Pleading, 5th edit. 296,(a) it is said, that "no matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation. Thus, it may be pleaded without duplicity, that, after the cause of action accrued, the plaintiff (a woman) took husband, and that the husband afterwards released the defendant; for, though the coverture is itself a defence, as well as the release, yet the averment of the coverture is a necessary introduction to that of the release."

[CRESSWELL, J. Is this *necessary* inducement?] It is submitted that it was competent to the defendant to show the entire transaction. If the

*283] warrant of attorney was given and *received in satisfaction of the note, it would bar the remedy as well in respect of the original debt as of the note: but it is by no means clear that the same consequence would follow, if the warrant of attorney was given in satisfaction of the original debt only. [COLTMAN, J. Would not the plea have been equally good, if it had alleged that the warrant of attorney was given in satisfaction of the original debt, and also of a certain promissory note, &c.?] That is, in substance, what the plea does allege. [V. WILLIAMS, J. No objection is taken to the plea, on the ground of argumentativeness. Would it have been a variance, if the plea had alleged that the warrant of attorney was given in satisfaction of the original debt, and the proof were that it was given in satisfaction of the note also?] Clearly not. [CRESSWELL, J. You must contend that the second branch of the plea would not afford an answer, without introducing the first.] It is so submitted.

T. Jones, in reply. The allegation as to the delivery of the note for and on account of the bill, clearly was not in any sense *necessary* inducement or introduction to the second branch of the plea, viz. the delivery of the warrant of attorney in satisfaction and discharge of the original debt. [V. WILLIAMS, J. Would the plea have been objectionable if it had alleged that the plaintiff had received a promissory note for and on account of the bill declared on, and that the note was afterwards paid?] That would have been unexceptionable. [V. WILLIAMS, J. What is the difference between such a plea and one alleging the delivery of a note for and on account of the original debt, and that it was afterwards satisfied by the giving of a warrant of attorney?] The objection is this—the plea alleges the delivery of a note, which *prima facie* imports satisfaction; and it goes on to allege a second satisfaction of the same debt, *284] by *means of a warrant of attorney. *Kearslake v. Morgan* and *Richardson v. Rickman* are distinct authorities to show that the first part of this plea would alone afford an answer to the action:

(a) Citing Bac. Abr. *Pleas and Pleadings*, (K. 2), Com. Dig. *Pleader*, (E. 2), and 24 E. 3, fol. 75 b, (M. 24 E. 3, fol. 75, pl. 98: where, in a writ of entry *en le quibus* by the heir of C the disseisee, the tenant pleaded that J., whose heir the demandant was, being seised in fee, gave to T., and A. in tail, who had issue C., that C. dying without heir of his body, J. entered as reversioner, and enfeoffed the tenant, and afterwards released to him all his right with warranty. It was held, that the release with warranty was alone traversable, and that the other matters were but inducement.)

and those cases are not necessarily in conflict with *Price v. Price*. [CRESSWELL, J. In *Richardson v. Rickman*, the bill appeared on the face of the plea to have been negotiated; here, it is otherwise.] That circumstance is not relied on as a ground for the decision. Channell, Serjt., referred to *Maillard v. The Duke of Argyle*, 6 M. & G. 40, 7 Scott, N. R. 938. There, to assumpsit for work and labour, &c., the defendant pleaded, as to 250*l.*, parcel, &c., that he made the promises jointly with B. and R.; that, before the commencement of the suit, B. and R., for themselves and the defendant, delivered to the plaintiff divers bills of exchange, in the whole amounting to 250*l.*; which said bills of exchange were so delivered by B. and R. to the plaintiff, and by him taken and received, *for and on account* of the said sum of 250*l.*; parcel, &c., and *in payment thereof*; that the plaintiff afterwards endorsed the bills to certain persons to the defendant unknown; and that such persons, and not the plaintiff, at the time of commencing the suit, were and still are the holders thereof respectively; and it was held that the plea was neither double nor inconsistent and repugnant—for, that “payment” does not necessarily import “satisfaction.”]

WILDE, C. J. It appears to me that this plea is free from the objection of duplicity. At first sight, the question seemed to present a difficulty which vanishes upon better consideration. The plea commences with stating, that, after the maturity of the bill mentioned in the first count, the defendant delivered his promissory note, payable on demand, to the plaintiff, who then took *and received the same for and on account of the bill and the causes of action in respect thereof. Now, this instrument was of no greater effect than the original liability of the defendant, viz. to pay the debt on request, and in no respect alters the position of the parties; for, it appears that the note still remains in the possession of the plaintiff, the plea alleging that a warrant of attorney was afterwards given in satisfaction and discharge of the note, and of all causes of action in respect thereof, as well as of the causes of action in the first count mentioned,—which it could not be unless the note remained in the plaintiff's hands. The only mode, therefore, by which the plaintiff's demand is said to have been satisfied, is, by the delivery of the warrant of attorney. If the warrant of attorney was given in satisfaction of the note, that, in point of law, would be a satisfaction of the original debt: and the allegation in the plea, that the last-mentioned security was given in satisfaction and discharge of the note and of all causes of action in the first count mentioned, is but an allegation of the legal effect of the facts before stated. Putting it at the highest, the note is but in the nature of a collateral security; and the warrant of attorney satisfies both the original debt and the collateral security. The plea, therefore, states but one defence. It is unnecessary to examine with any great minuteness whether the recent decision of *Price v. Price* breaks in upon the doctrine laid down in *Kerslake v. Morgan*. The Court of Exchequer cer-

tainly does not seem to have intended so to do; but it professes to decide the case before it upon a distinction that is plain and palpable. *Price v. Price* does certainly seem to be inconsistent with *Mercer v. Cheese*; but *Mercer v. Cheese* was not a distinct decision, counsel having elected to amend, upon a mere intimation of opinion. I therefore think that upon this demurrer there should be judgment for the defendant.

*286] **COLTMAN, J.* The only question before us is, whether this plea is double. At first, I doubted whether it did not present two defences, which, though one be ill pleaded, may constitute duplicity. But, upon consideration, I am satisfied that this objection does not arise. The plea begins with stating that which might or might not be a satisfaction of the original cause of action, viz. the giving the note. It then goes on to show what became of the note, viz. that it was satisfied by the delivery to the plaintiff of a warrant of attorney; and the allegation that the warrant of attorney was a satisfaction of the note and also of the original cause of action, is but the legal result of what is before stated.

CRESSWELL, J. I am of the same opinion. It is contended that the plea is double, because the delivery of the promissory note therein alleged operated either as a satisfaction of the original debt or as a suspension of the remedy, and the delivery of the warrant of attorney also operated as a separate and independent satisfaction. That which is stated with respect to the note, however, falls short of satisfaction, or suspension of remedy. A note payable on demand could be no satisfaction of the debt, or suspension of the remedy, so long as it remains in the hands of the plaintiff. It would be no defence on general demurrer. It is not a defence ill pleaded, but simply no defence at all.

The *only* defence the plea sets up is, the delivery of the warrant of attorney; and the plea is not rendered bad by the allegation that the warrant of attorney was given in satisfaction and discharge of the note, and of all causes of action in respect thereof, as well as of the causes of action in the first count mentioned.

V. WILLIAMS, J. I am of the same opinion. It is quite unnecessary *287] to say whether the intimation thrown out by this court in *Mercer v. Cheese* was correct, or whether that case was properly overruled by the Court of Exchequer in *Price v. Price*. It seems to me that this plea is not bad for duplicity, whatever might have been its fate had it been objected to on the ground of argumentativeness. It falls within that class of pleas which show a *quasi* satisfaction by the delivery of a negotiable security, and which pleas are not made double by their going on to show that the instrument has been paid, or, in other words, by showing that that which at first was only a *quasi* satisfaction, has become an absolute satisfaction.

Judgment for the defendant.

WEBB v. HURRELL. April 28.

In an action by A. against B. execution executed upon a foreign attachment in the lord mayor's court of London, is a good plea in bar of the further maintenance of an action in this court against C. the garnishee in respect of the same debt.

A plea, alleging that the plaintiff was levied in the lord mayor's court before the commencement of the suit here, but not averring that the *scire facias quare executionem non* issued against C. had issued before the commencement of the suit here—is sufficient.

In such a case, the plea,—following the allegation of the custom, which was not traversed,—stated, that, at a certain court, it was commanded to the serjeant-at-mace that he, according to the custom, should warn the defendant, without setting forth any precept:—*Held*, sufficient.

DEBT, for goods sold and delivered, and for money due upon an account stated.

Except as to 67*l.* 10*s.*, parcel, &c., the defendant pleaded *nunquam indebitatus*. And, as to the said sum of 67*l.* 10*s.*, *actio. alterius non*, because he said, that the city of London now is, and immemorially has been, an ancient city, and that there is, and immemorially has been, a custom therein, that, if any person affirms, or hath affirmed, a plaint in debt in the court of her present majesty or her predecessors, kings or queens of England, held, or to be holden, before the mayor *and [*288 aldermen of the said city for the time being, in the chamber of the Guildhall of the said city, within the said city, according to the custom of the said city, and upon such plaint it be or hath been commanded by the court to any of the serjeants-at-mace and ministers of the said court, to summon such person named defendant in such plaint to appear in the same court to answer the plaintiff in such plaint, and if it is or has been certified and returned by such serjeant-at-mace and minister of the court that the defendant in such plaint has or had nothing within the said city, or the liberties thereof, whereby he can or could be summoned, nor is nor was to be found within the said city, and such defendant at that court being solemnly called, makes or has made default, and in the same court it is or has been alleged by the plaintiff in the plaint that any other person owes or has owed to such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof, then, at the petition of such plaintiff made to the same court, for process according to the custom of the said city, that is to say, that such person so owing or having owed such debt as aforesaid, being found within the jurisdiction of the said court, may or might be warned by the said serjeant-at-mace or minister of the said court not to part with such debt or sum of money so being in his hands and custody without license of the said court, but the same in his hands and custody safely to keep, so that the said defendant may or might be attached thereby, that he may or might appear in the same court to answer the plaintiff in the plea in such plaint specified, it is and has been commanded by the court to one of the serjeants-at-mace and a minister of the court, to attach such defendant in such plaint, by such sum of

money so being in the hands or custody of such other person, according to the said custom, so that such defendant may or might appear at the

*289] then next court, to be holden *before the said mayor and aldermen, in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified; and then, if such serjeant-at-mace and minister of the court return and certify to such court such defendant to be attached, according to the said custom, by such sum of money, so being in the hands or custody of such other person, to be defended and kept so that such defendant in such plaint named may or might appear at the same or the then next court holden, or to be holden, to answer such plaintiff in the plea in such plaint specified; and if the defendant, at that and three other courts then next severally holden, or to be holden, before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four courts, after such attachment made; and if such plaintiff in such plaint named, at every of such four courts, in his own person, or by his attorney, appear and offer himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then, at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court to warn such other person, so being found within the said city, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen of the said city, to show if any thing he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid and if at such court such serjeant-at-mace return and certify

*290] such other person in whose hands such sum of money is or *has been attached, to be warned, according to such custom, to be and appear in the same court to show such cause; and if such person so warned, being solemnly called at such court, do not appear, or has not appeared, but makes or has made default, then it is, and from time immemorial it has been used and accustomed, for such court to award such plaintiff to have execution of such sum so attached to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the same court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant, within a year and a day thence next ensuing, come, or has come, into the court so holden, and disposes or avoids, or has disposed or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that, after such pledges

found, and execution had of such sums so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached, or is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remains in force and effect, not revoked or disproved by such defendant; and, if such sum of money so attached and defended and had in execution, amount not nor has amounted to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said court is, and from time immemorial has been, used and accustomed to have process against such defendant, according to *such custom, for the residue of his debt by him in such plaint [*291 demanded: that the said custom, and all other customs of the said city obtained and used in the said city during all the time aforesaid, were, by authority of a parliament holden in the 7th year of the reign of his majesty, Richard the Second, late King of England, ratified and confirmed to the then mayor and commonalty of the said city and their successors: that Charles Barnard, before the commencement of this action of the plaintiff in this suit against the defendant in this suit, to wit, on the 29th of April, 1846, in his own proper person came into the court of our sovereign lady the queen then, before the mayor and aldermen of the said city of London, in the chamber of the Guildhall, of and within the said city, according to such custom—the said chamber then and still being in and parcel of the said Guildhall—and then and there affirmed a certain plaint against the now plaintiff, George Webb, in a plea of debt upon demand, 150*l.* of lawful money of Great Britain,^(a) and the said C. Barnard then, in the same court according to such custom, found pledges to prosecute such suit, to wit, John Doe and Richard Roe, then and there appointed in his stead J. C., his attorney, against the said now plaintiff, in the plea of the said plaint, according to such custom, and it was granted to him, &c., whereupon, at the petition of the said C. Barnard, then and there made to such court by his said attorney, and by virtue of such plaint, it was then and there commanded by the said court to Charles Sewell, then being one of the sergeants-at-mace of such court,^(b) that he, according to such custom, should summon by good summoners, the plaintiff in this suit, to appear *at the same court*, so holden before the mayor and aldermen of [*292 *the said city, in the chamber of the Guildhall of the said city, to answer the said C. Barnard, in the plea in such plaint specified, and that the said Charles Sewell should return and certify what he should

(a) Not alleging that the debt arose within the jurisdiction of that court.

(b) Not stating him also to be a "minister" of the court. Vide ante, p. 288.

do by virtue of the said precept; that, afterwards, at the same court, the said Charles Sewell, according to such custom, returned and certified to the same court, that the plaintiff in this suit had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same; and thereupon the now plaintiff was then and there, at the same court, solemnly called, and did not appear, but made default; that thereupon, afterwards, and before the commencement of this action, to wit, on, &c., last mentioned, at the same court, it was alleged by the said C. Barnard, by his said attorney, that the said C. J. Hurrell, the now defendant, owed to the now plaintiff 67*l*. 10*s*. in moneys numbered, as the proper moneys of the now plaintiff, and then had and detained the same in his hands and custody; (a) that he, the now defendant, at the time when it was by the said C. Barnard, by his said attorney, so alleged as last aforesaid, was and was found within the said city, and within the jurisdiction of the same court; that thereupon the said C. Barnard, by his said attorney, then and there prayed process, according to such custom, to attach the now plaintiff by the said 67*l*. 10*s*., so being in the hands and custody of the now defendant, so that the now plaintiff might appear at the next such court to be held before the mayor and alderman of the said city, in the chamber of the Guildhall of and in the said city, to answer the said C. Barnard in the plea in such plaint specified—whereupon at his said petition, it was then and there commanded by such court, before *293] the commencement of *this action, to the said serjeant-at-mace and minister of the said court, that he, according to such custom, should attach the now plaintiff by the said 67*l*. 10*s*., so being in the hands and custody of the now defendant as aforesaid, and the same in his hands and custody defend and keep, according to such custom, so that the now plaintiff might appear at the then next such court to be holden before the said mayor and aldermen of the said city, in the Guildhall of the said city, to wit, on Saturday, the 2d of May then next, according to such custom, to answer the said C. Barnard in the plea in the said plaint specified, and that the said serjeant-at-mace and minister of the said court should then return and certify to such court what he should do by virtue of that precept—and the same day was given to the said C. Barnard; that afterwards, and before the commencement of the suit, to wit, on the day and year last aforesaid, he, the now defendant, being then found within the said city, and within the jurisdiction of the said court, was then and there duly warned according to the said custom, by the said serjeant-at-mace and minister of the said court, not to part with the said sum of 67*l*. 10*s*., without the license of the said court, but the same in his hands and custody safely to keep, so that the now plaintiff might be attached thereby that he might appear at the

(a) No statement that it was suggested to the court that Hurrell was within the jurisdiction, or that the debt arose there. Vide 1 *M. & G.* 25 n., 4 *M. & G.* 944, n.

said then next court, to answer the said C. Barnard in the plea in the said plaint specified; that thereupon the said serjeant-at-mace duly attached the now plaintiff by the said sum of 67*l.* 10*s.*; that afterwards, to wit, at the said then next court, holden before the said mayor and aldermen of the said city, in the said chamber of the Guildhall of the said city, on the said Saturday, the 2d of May last aforesaid, the said C. Barnard, by his said attorney, appeared, and the said serjeant-at-mace returned and certified to the same court, that he, by virtue of the said precept, had theretofore, to wit, on the 30th of April, in [*294 *the year last aforesaid, between the hours of 12 and 1 of the clock in the afternoon, attached the now plaintiff by the said 67*l.* 10*s.*, so being in the hands and custody of the now defendant, and the same had defended and kept in his hands and custody, according to such custom, so that the now plaintiff might appear at the said court so holden of the said 2d of May in the year aforesaid, to answer the said C. Barnard in the said plea in his said plaint specified; that thereupon the now plaintiff, at the same court was solemnly called, but did not appear, but then made a *first* default, which said first default, at the same court was recorded according to such custom; that thereupon, according to such custom, a further day was then given by the same court to the said now plaintiff, to appear at the then next such court, to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on, &c. The plea, after alleging three other defaults, proceeded to aver—that thereupon afterwards, and after the said four defaults had been recorded as aforesaid by the same court against the now plaintiff in the plea aforesaid, according to such custom, the said C. Barnard, by his said attorney, then at the same court prayed process, according to such custom, to warn the now defendant, the garnishee, to be and appear in the same court, to be holden on Saturday the 9th of May then instant, to show cause why the said C. Barnard should not have execution of the said 67*l.* 10*s.*, so attached in his said hands and custody; that thereupon, at such court so holden as aforesaid, on Wednesday, the said 6th of May, in the year aforesaid, at the said petition of the said C. Barnard, made in such court, it was commanded by the said court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to the now defendant, being the garnishee, (a) to be and appear in such *court to be [*295 so as aforesaid holden on Saturday, the said 9th of May then instant, (b) to show cause why the said C. Barnard should not have execution of the said 67*l.* 10*s.*, so attached in his hands and custody, and that the said serjeant-at-mace should then return and certify to the same court what he should have done by virtue of such precept—and the same day was given by the same court to the said C. Barnard to be

(a) He became *garnishee*, i. e. the party "warned" upon being summoned on the *sci. fa.*

(b) Not stating that this was before the commencement of the action.

there, according to such custom; that, afterwards, to wit, on the day and year last aforesaid, he the now defendant was, within the said city, duly warned by the said serjeant-at-mace to be and appear at such court to be so as aforesaid holden on the said 9th of May, to show cause why the said C. Barnard should not have execution of the said sum of 67*l.* 10*s.*; that, at the said court holden on the said Saturday the 9th of May, in the year last aforesaid, the said C. Barnard, by his said attorney, appeared, and the said serjeant-at-mace then returned and certified to the same court, that he, by virtue of such precept to him directed, and according to such custom, had warned and made known to the now defendant, the garnishee, to be and appear at the same court, to show such cause; that, thereupon, at the same court, the now defendant, the garnishee in such attachment, was solemnly called, according to such custom, and did not appear, but made default; that thereupon, according to such custom, it was considered by the same court that the said C. Barnard should have execution of the said 67*l.* 10*s.* in moneys numbered, so attached, and that he should retain and hold the same in full satisfaction of the like sum of 67*l.* 10*s.*, parcel of the debt in the said plaint mentioned, by sufficient pledges to be found and given by the said C. Barnard in the same court, according to such custom, to restore to the now plaintiff the said 67*l.* 10*s.* so attached, if

*296] the *now plaintiff, within a year and a day thence next ensuing, should come into the said court and disprove or avoid the same debt in the said plaint mentioned; that thereupon the said C. Barnard, afterwards, to wit, on the day and year last aforesaid, at the same court, according to such custom, found sufficient pledges, to wit, &c. &c., to restore to the said now plaintiff the said 67*l.* 10*s.*, so attached, if the now plaintiff, within a year and a day thence next ensuing, should come into the same court, holden as aforesaid, and disprove or avoid the debt in the said plaint mentioned, according to such custom; that thereupon the said C. Barnard, afterwards, to wit, on the day and year last aforesaid for the purpose of obtaining execution of the said sum of 67*l.* 10*s.*, so attached as aforesaid, sued out of the same court, according to the custom of the said court, a certain precept, directed by the said court to the said Charles Sewell, being one of the serjeants-at-mace of the said court, whereby he was commanded by the said court that he should take the now defendant, if he should be found within the liberties of London, and him should safely keep, so that he might have his body there in court without delay, to satisfy the said C. Barnard 67*l.* 10*s.* attached in his hands at the suit of the said C. Barnard as the proper moneys of the said G. Webb, the now plaintiff, by due process of attachment and judgment of the court there recovered against him the now defendant according to the tenor and effect of the said judgment thereof given; that the said precept was afterwards, and within the jurisdiction of the court, to wit, on the day and year aforesaid, delivered to the said Charles

Sewell to be executed in due form of law; that thereupon he the now defendant, afterwards, and after the commencement of this action, and whilst the said precept was in the hands of the said Charles Sewell for the purpose of being executed, to wit, on the day and *year last [*297 aforesaid, being then within the city of London, and the jurisdiction of the said court, was then and there forced and obliged to, and then and there necessarily did, for the purpose of satisfying the said judgment, pay to the said C. Barnard the said sum of 67*l.* 10*s.*, according to the exigency of the said precept, and thereby the said C. Barnard then and there, according to the custom of the said court, had execution of the said debt of 67*l.* 10*s.* against the now defendant, the said garnishee, according to the tenor of such judgment in that behalf given, and thereby the said execution then was executed; as by the record and proceedings thereof remaining in the chamber of the Guildhall of the city of London aforesaid more fully appeared; that the said 67*l.* 10*s.* so attached, and of which the said C. Barnard had execution by virtue of such judgment, accrued due from the now defendant to the now plaintiff, and the now plaintiff's cause of action in respect thereof arose, within the city of London, and the jurisdiction of the said court, and not elsewhere; and that the said 67*l.* 10*s.* were so *attached before* and *paid after* the commencement of this suit, and that the said execution was duly executed in the said city according to the custom of the said city; and that the said judgment and execution were still in force, and not in the least by the plaintiff, or otherwise, disposed or avoided; and that the said sum of 67*l.* 10*s.*, parcel, &c., in the introductory part of the plea mentioned, was the very same identical sum of 67*l.* 10*s.*, so attached and taken in execution by the said C. Barnard by virtue of the judgment aforesaid—verification.

Special demurrer, assigning for causes—that it does not appear that Barnard affirmed a plaint of a debt arising within the jurisdiction of the said court; that it does not appear that the summons in the plea mentioned, was a summons within the supposed custom therein mentioned, since, by the custom, the court ought to command *any* of the serjeants-at-mace and ministers of the *said court to summon the defendant [*298 in the plaint, and it merely appears that Charles Sewell, who was commanded to summon the defendant, was one of the serjeants-at-mace of the said court, and it does not appear that he was a *minister* of the said court; that it does not appear that any summons or precept issued out of the said court, or was delivered to the said Charles Sewell; that the said summons, being returnable at the same court at which it was made, was unreasonable and void, and the plaintiff could not have been summoned thereon or appeared thereto, and the plaintiff was not, and could not have been, guilty of any default in not appearing to the summons; that it does not appear that the certificate and return of the said Charles Sewell was made upon the said summons; that it does not

appear that it was suggested to the court that the defendant was within the jurisdiction of the said court, or that the said sum of 67*l.* 10*s.*, was within the jurisdiction of the said court; that it does not appear that the said *scire facias* to warn the defendant to appear upon the said foreign attachment was before the commencement of the suit, or that the said judgment was given, or that the said execution was issued, or that the said money was paid, *before the commencement of the suit*; and that it does not appear that the said execution was executed, or that the said Charles Sewell took the defendant, or that he had his body in court to satisfy Barnard, or that the defendant satisfied Barnard, under the said execution.

The defendant joined in demurrer.

Petersdorff, in support of the demurrer. The principal point for discussion here, is, how far a plea of foreign attachment can be good without distinctly alleging that execution has been executed against the garnishee before the commencement of the action in which the attachment is pleaded. There are numerous authorities to show, that, to
 *299] operate in bar, the *proceedings in the lord mayor's court must be complete, before the commencement of the action: *Pell v. Pell*, Cro. Eliz. 101; *Benington v. Benington*, Cro. Eliz. 157. [WILDE, C. J. The attachment binds the money.] It is not enough that proceedings are pending in the lord mayor's court: to be available as a defence, there must have been execution actually executed. In *Roberthson v. Norroy*, Dyer, 83 a, it was certified by *Brooke*, Serjt., recorder of London, that, if judgment against the third person on a foreign attachment in London be not executed, the plaintiff may resort back to his principal debtor, and he may sue the garnishee notwithstanding the judgment. So, in *Humphrey v. Barns*, Cro. Eliz. 691, such a plea was held insufficient; "for," as WALMSLEY, J., said, "the suit depending in the Queen's court, the said court is interested therein; and it is against the dignity thereof to have an inferior court meddle with it: also, whilst the suit is depending, it is *quasi in custodia legis*, and cannot be meddled with by another." Ashley's Practice in the Lord Mayor's Court, page 81; two anonymous cases in Leonard, (1 Leon. 264, 3 Leon. 210;) *Magrath v. Hardy*, 4 N. C. 782, 6 Scott, 627; and *Crosby v. Hetherington*, 4 M. & G. 938, 5 Scott, N. R. 637, are also authorities to show that the plea is insufficient. It clearly is no answer to the further maintenance of the action. It ought to show something equivalent to a satisfaction of the plaintiff's demand. [CRESSWELL, J. Suppose two actions brought for the same cause, one after the other; and the defendant neglects in the second to plead the pendency of the first action: judgment having been obtained in the first action, could the defendant plead that judgment to the further
 *300] maintenance of the second action?] It is submitted he could *not. The question is, whether there can be a plea to the further maintenance of the action, that does not embrace the costs of the former

proceedings. The defendant might have some ground for applying for relief to the equitable jurisdiction of the court, as in *Chamberlayne v. Green*, 9 M. & W. 790. There, the plaintiff, having obtained final judgment in a cause in the Court of Exchequer, afterwards proceeded for the same cause of action by foreign attachment in the lord mayor's court in London, against the defendant's goods: the defendant surrendered himself into custody in discharge of the attachment: and, on the following day, whilst he was so in custody, the plaintiff issued a *ca. sa.*, under which the defendant was detained: it was held that the *ca. sa.* was not irregular; and that, the plaintiff having abandoned his proceedings in the lord mayor's court, and the defendant having in consequence obtained judgment of *nonpross* thereon, there was no ground for his discharge under the equitable jurisdiction of the court. PARKE, B., said; "It seems to me that there is no irregularity in this case, but that the circumstances merely afford ground for an application to the discretion of the court, to relieve the defendant from the consequences of two remedies for the same debt being pursued at the same time. It is analogous to the case of a person bringing two actions for the same debt, where it is the practice of the court to relieve the defendant on motion, instead of leaving him to plead the pendency of the former action." [WILDE, C. J. On a plea *puis darrein continuance* the plaintiff gets no costs. I see no difference in principle between such a plea and a plea to the further maintenance of the action. CRESSWELL, J. Except that, in the one case, the defence arises after plea pleaded.] To be a good answer, it should *show an answer to the costs and damages, as well as the debt; *Francis v. Crywell*, 5 B. & Ald. 886; *Henry v. Earl*, 8 M. & W. 228, 9 Dowl. P. C. 725. [*301]

The other objection is, that it is not alleged in the plea that any precept was made to the serjeant-at-mace, Sewell, commanding him to warn the garnishee, the now defendant: but merely that, at a certain court, it was commanded to the serjeant-at-mace that he should, according to the custom, warn the defendant; and, there being no precept on which the officer could make a return, the subsequent allegation that he did make a return does not cure the defect. [CRESSWELL, J. It is alleged in the very terms in which the custom is alleged: and the plaintiff has not traversed the custom.]

Bovill, contrd. None of the cases cited have any direct application to the present. In all of them the proceedings in the lord mayor's court had their inception subsequently to the commencement of the action in the superior court. In *Brook v. Smith*, 1 Salk. 280, in assumpsit, evidence was given that the debt was attached, by the custom of London, before the action brought, and condemnation had there before plea pleaded; and it was urged that this should relate to defeat the action. But, *per cur.*, it was ruled, that, "if an attachment and condemnation be before the writ purchased, it may be given in evidence on the general

issue, because that is an alteration of the property before the action brought; but, if the attachment only be before the writ purchased, it ought to be pleaded in abatement of the writ; and, if the *condemnation* be after the action commenced, and before plea pleaded, then it may be pleaded in bar, but shall not be given in evidence on non assumpsit, (a)

*802] for that "the property is not altered until condemnation." That authority is adopted by Comyns, Dig. tit. *Attachment* (H), without qualification. So, in *Savage's case*, 1 Salk. 291, in assumpsit upon a note for 10*l.* 15*s.* given by the defendant to the plaintiff, and non assumpsit pleaded, upon trial the plaintiff produced and proved the note. The defendant, in discharge of himself, produced the record of a foreign attachment, wherein the said debt was attached by the city process for the satisfaction of a debt demanded there of the plaintiff, and was there condemned. And it was ruled by TREVOR, C. J., "that this was a good discharge; but that, if the plaintiff in this action could have showed the original, wherein he declared, to be precedent to that attachment, so that it had appeared that this court was possessed of an action for the demand of this debt before it was attached, then should the plaintiff have recovered his debt, notwithstanding such evidence: but the declaration in the record here was betwixt the time of the attachment and of the condemnation." The same doctrine is found in *Nathan v. Giles*, 5 Taunt. 558. And in *Palmer v. Hooke*, 1 Ld. Raym. 727, it was held that a debt cannot be attached under a foreign attachment, if the action was commenced for it before the institution of the suit in which the attachment issued. The pleadings in *Banks v. Self*, 5 Taunt. 234, and *Crosby v. Hetherington*, show that the plea here is in the usual form: it states all the facts necessary to give a complete discharge. From the time of the Year Books to the present time it has always been held sufficient to allege the *suing out* of execution. This custom as alleged is admitted, and this case is clearly brought within it.

Petersdorff, in reply, admitted that he could not distinguish *Brook v. Smith* and *Savage's case* from the *present, but insisted that they were not borne out by the authorities previously cited.

WILDE, C. J. It does not appear to me that the objections urged to this plea are well founded. On the contrary, I am of opinion that the authorities relied upon on the part of the defendant, show the plea to be good. It appears that the defendant, before the plaintiff has obtained judgment, has been placed in a situation in which he has, through the plaintiff himself, acquired a good answer to the action: and it seems to me, upon general principles, that, where such answer arises before judgment, it may be pleaded to the further maintenance of the action, or, *puis darrein continuance*, if after plea pleaded. I can see no difference in principle between the two. In both cases, the plea is an effectual bar, without professing to answer the damages and costs. These, how-

ever, are but incidents. Upon a plea of bankruptcy and certificate, and in many other cases, the principal matter being answered, all that is accessory falls to the ground. This is a plea of foreign attachment. All the cases of the kind that I recollect, are cases in which, as in *Magrath v. Hardy*, the party was alleged to have proceeded to execution in the lord mayor's court: and the general principle is well recognised that an execution executed in the court below before judgment in the action in the superior court, is a bar to such action. The present case appears to me to fall within all the decisions upon the subject. The objection, that it does not appear that the *scire facias* issued before the commencement of the present action, altogether fails. And the other objection was sufficiently answered in the course of the argument. The plea seems to me to be consistent with all the authorities, and therefore I think the defendant is entitled to judgment.

*COLTMAN, J. *Brook v. Smith and Savage's case* seem to me fully to warrant our judgment in favour of this plea. And I see [*304 no reason to overturn them.

CRESSWELL, J. I am of the same opinion. The two cases in *Salkeld* seem to have been made expressly to dispose of this question.

V. WILLIAMS, J., concurred.

Judgment for the defendant.

RICHARDSON v. TUBBS. April 30.

By a local act for the improvement of a particular portion of a parish, it was provided that every inhabitant or owner who should be assessed for the rates made under that act for any lands or tenements within the limits of the act, should be released and free from all rates and assessments towards the *paving and lighting* any other street, road, or place within the parish, in respect of such lands or tenements.—*Held*, that this did not exempt an occupier of premises assessed within the local district from being assessed in a general highway rate imposed upon the whole parish, although a portion of such rate might be expended in *paving* parts of the parish out of the district.

TRESPASS, for seizing and distraining the plaintiff's goods. Plea, not guilty "by statute."

At the trial, before the lord chief justice, at the sittings after Michaelmas term, 1845, a verdict was found for the plaintiff, subject to the opinion of the court on a special case, with liberty to either party to turn such special case into a special verdict.

The plaintiff is the owner of an estate called the Norland Estate, consisting of land, houses, and other buildings, in the parish of St. Mary Abbots, Kensington. The defendant is a justice of the peace acting in and for the division of Kensington, in the county of Middlesex. The alleged trespass was committed by a bailiff seizing *the chattels [*305 named in the declaration under a distress warrant, for arrears of highway rate claimed from the plaintiff in respect of one of the houses of the Norland Estate; which warrant was signed and sealed by the defendant as such justice of the peace, while acting within the

local limits of his jurisdiction. The arrears consisted of the sum of 12s. 6d. at which the plaintiff had been rated in the highway rate for the parish of St. Mary Abbots, Kensington, in respect of his being (as was the fact) the owner and occupier of the house or office called the Norland Estate office, situate and being on, and forming part of, the said Norland Estate, and which said rate was duly made and assessed (if the plaintiff be liable to be assessed at all) on the 3d of July, 1844; and, such rate having been duly signed, allowed, and published, the plaintiff had due notice of the said sum of 12s. 6d. being due from him in respect of his said assessment therein.

The plaintiff did not appeal, either to any special sessions, or to the court of quarter sessions of the peace, against this rate, but refused to pay the sum when it was duly demanded; alleging, that, by the operation of a certain act of parliament hereinafter referred to, he was not liable to be rated at all in the said highway rate in respect of the said house or office called the Norland Estate office. On such refusal, the plaintiff was duly summoned (the time for appealing against the said rate having expired) to appear before the defendant, as such justice of the peace as aforesaid, to show cause why a distress warrant should not issue against him for the non-payment of the amount of the said rate so laid on him and so demanded as aforesaid; and, the plaintiff failing, in the judgment of the defendant, when before him, the defendant as such justice as aforesaid, on such summons, to show any reason why he should not pay the said sum of 12s. 6d. so laid on him as aforesaid, the *defend-
 *306] ant signed and sealed a distress warrant, valid and correct on its face, by the authority of which warrant the bailiff to whom it was directed, seized the plaintiff's goods at the said house or office called the Norland Estate office, and so assessed as aforesaid; which seizure is the trespass complained of.

Prior to the commencement of this action, due notice was given to the defendant of the intention to commence the same.

The act of parliament above referred to is an act of 6 & 7 Vict. c. xxxiii. (which received the royal assent on the 31st of May, 1843) and is, by sect. 154, declared to be a public act. It is intituled "An act for the improvement of the Norland Estate, in the parish of St. Mary Abbots, Kensington, in the county of Middlesex."

Either party was to be at liberty to refer to any parts of the act; but the following were the parts which, on the part of the plaintiff, or on that of the defendant, were mainly relied on as showing the meaning of the legislature in respect of any exemption of the Norland Estate, in the parish of St. Mary Abbots, Kensington, from the highway assessment for that parish.

The preamble of the act is as follows: — "Whereas, a certain square called Norland Square, and a certain crescent called Royal Crescent, and certain terraces, streets, or rows of houses, called Norland Terrace,

Norland Place, Union Terrace, Prince's Road, Queen's Road, Norland Road, and Addison Road North, have been either wholly built, or are partly built, and will be shortly completed, on certain freehold pieces or parcels of land situate in the parish of St. Mary Abbots, Kensington, in the county of Middlesex, called or known by the name of the Norland Estate, which estate is bounded, &c. &c. ; and it is in contemplation to build other squares, crescents, streets, or rows of houses, some of which have been already planned and laid out on the *said estate: and [*307 whereas, it would be of great convenience and advantage to the owners and occupiers of houses on the said estate, and also of public advantage, if power were given for lighting and cleansing the said estate, and for paving, gravelling, watering, repairing, and otherwise improving the said squares, crescents, streets, and rows of houses, now or hereafter to be made on the said estate; and it will also be desirable to provide for the maintenance of the gardens or pleasure grounds now or hereafter to be made or laid out on the said estate; but the said objects cannot be effectually attained without the authority of parliament."

The 79th section is as follows:—"Provided always, and be it enacted, that nothing herein contained shall render the commissioners for carrying this act into execution, liable to keep in repair any footway, causeway, or carriage-way, within the limits of this act, or be liable to be indicted at common law for the want of the sufficient repair of the same, after such footway, causeway, or carriage-way, shall have been dedicated to the use of the public."

And the 83d section enacts "that every inhabitant or owner who shall be assessed for the rates made under this act, for any lands or tenements within the limits of this act, shall be released and free from all rates and assessments towards the *paving and lighting* any other street, road, or place within the parish of St. Mary Abbots, Kensington, in respect of such lands or tenements."

On the trial of the cause, it was proved, that, for many years previous to, and at the time of, the passing of the above act for the improvement of the Norland Estate, the land constituting the Norland Estate was liable to be assessed, and had accordingly been duly assessed, to the highway-rate for the same parish of St. Mary Abbots, Kensington, and that, from the *time the highway-board of the said parish [*308 was first constituted, in the year 1838, down to the time of the trial of this cause, without any intermission, parts of the public streets throughout the said parish out of the said act (over and along which public streets, the queen's subjects had a right to pass and repass on foot, and with horses, carts, and carriages) have been kerbed and paved with stone, and repaired, out of the said highway-rates, and, amongst others, out of the rate in respect of which the distress was made on the goods of the plaintiff.

The defendant, however, on this proof being tendered, objected to its

relevancy; and the question as to the admissibility and relevancy of such evidence, is reserved for the court. It was admitted, at the trial, that the plaintiff had been, and was at the time of the making of the rate in respect of which the distress was made, duly assessed for the rates made under the said act for the improvement of the Norland Estate, for the house or office in question; and that the same house or office was and is within the limits of this act.

The parts of public streets above-mentioned on which such rates had been so in part expended, were certain footpaths made of paving stone, or kerbed with stone, for the convenience of foot-passengers, and laid alongside of the open carriage-way in various parts of the said parish.

It was agreed and admitted between the parties, that no part of any of the said highway-rates had been applied towards *lighting* any street, road, or place, within the said parish.

On these facts, the plaintiff contended that his house or office in respect of which he was so rated as first aforesaid, was not liable to be so rated.

The defendant insisted on the following points:—

*309] First, that the plaintiff being, as was admitted, the *owner and occupier of a house in the parish, and which was *prima facie* ratable to the highway-rate, the special facts which were alleged to confer under the local act an exemption from such primary liability, ought to have been brought forward as a ground of appeal to special sessions, or quarter sessions, against the rate, and would not divest the justice who issued the warrant in question, of his jurisdiction in that behalf.

Secondly, that the 83d section did not operate to include within its terms (as contended by the plaintiff) the ordinary highway-rate of the parish, duly made under the provisions of the general highway act 5 & 6 W. 4, c. 50.

Thirdly, that, if the evidence hereinbefore mentioned to have been objected to were admissible, still the parts of public streets so as aforesaid paved, kerbed, and repaired, being, in point of law, as the defendant contended, highways, or parts of highways, it was for the board of highways of the said parish to determine whether any part of the highway-rates should be applied to the purposes hereinbefore set forth; and that, if the board improperly exercised their discretion in that respect, such their error could not be inquired into, in this form of proceeding.

If the court shall be of opinion that the plaintiff was entitled to recover, the verdict is to stand; otherwise, to be entered for the defendant.

Channell, Serjt., (with whom was Bodkin,) for the plaintiff. The premises in question were clearly not liable to be rated under the general highway-act, 5 & 6 W. 4, c. 50. By the 72d section of the local act, 6 & 7 Vict. c. xxxiii., the pavements, lamps, &c., within the limits of the act, are vested in the commissioners. The 73d section enacts “that

it shall be lawful for the commissioners, from time to time, to cause all or any of *the present or future *streets*, footways, and *carriage-ways*, within the limits of the act, or any part thereof, to be [*310 properly formed, levelled, paved, gravelled, and repaired, and the ground or soil to be raised, lowered, and altered, in such manner and with such materials as they shall think proper." And the 78th section enacts "that all causeways or footways within the limits of the act, whether made by the commissioners or otherwise, which the commissioners shall deem necessary to be kept up, shall be kept in repair by the commissioners:" provided—s. 79—that nothing therein contained shall render the commissioners liable to keep in repair any footway, causeway, or carriage-way within the limits of the act, or be liable to be indicted at common law for the want of the sufficient repair of the same, after such footway, &c., should have been dedicated to the use of the public. By the interpretation clause, s. 152, the word "street" is to include any square, street, court or alley, lane, road, thoroughfare, or public passage or place within the limits of the act: but no interpretation is put upon "carriage-way." And the 88d section enacts "that every inhabitant or owner who shall be assessed for the rates made under this act, for any lands or tenements within the limits of this act, shall be released and free from all rates and assessments towards the *paving and lighting* any other street, road, or place within the parish of St. Mary Abbotts, Kensington, in respect of such lands or tenements." Reading these several provisions as incorporated in the general highway act, 5 & 6 W. 4, c. 50, they operate to exempt the occupiers of the Norland Estate from being charged with any general rate for paving or lighting the parish of St. Mary Abbotts. [V. WILLIAMS, J. The general highway-act gives no authority to make a rate for *paving and lighting*.] The 19th section of the 5 & 6 W. 4, c. 50, authorizes *paving*; and, for any thing that appears, a portion of the rate in *question might therefore [*311 be applied to a purpose for which this district could not properly be assessed. It may be conceded, that, where a rate appears on the face of it to have been properly made, trespass will not lie against those who enforce it; but the remedy of the party grieved is, by appeal. Here, however, the inhabitants of the exempted district could not avail themselves of the right of appeal given by the 105th section of the general, or the 125th section of the local, act.

Pashley (with whom was *Talfourd*, Serjt.), *contrà*. A party who claims to be exempted from a rate which appears on the face of it to be well made, is bound to make out that exemption most clearly. [WILDE, C. J. Those who seek to impose a burden upon the subject, must establish a clear right to do so, in the first instance:] That is done here: the rate is admitted to be well made: and it is impossible to contend, that, because by possibility a portion of it may be applied to purposes that are not warranted by the statute, viz. paving, it is

therefore to be considered as a rate for paving. In *Bonnell v. Beighton*, 5 T. R. 182, where an enclosure act gave the commissioners power to set out and make roads, &c., and directed that the expenses of making and repairing those roads, and all other expenses, should be borne by the proprietors, in certain proportions, to be ascertained by the commissioners in one general rate; and then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved;—it was held, that an objection to the rate, on account of the commissioners having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions. If there be any ground of exemption, it should have been *312] shown to the magistrates *at the time; otherwise, he clearly is not liable: *Gwinne v. Poole*, 2 Lutw. 985, 987, 1560; *Lowther v. Lord Radnor*, 8 East, 118; *Pike v. Carter*, 8 Bingh. 78, 10 J. B. Moore, 376; *Calder v. Allday*, 8 Moore, P. C. 86; *Cave v. Mountain*, 1 M. & G. 257, 1 Scott, N. R. 182; *The King v. The Justices of Gloucestershire*, 1 B. & Ad. 1. Where there is a remedy by appeal, and the justice is acting in a matter in which he has jurisdiction, trespass will not lie: *Durrant v. Burgis*, 6 T. R. 580; *Weaver v. Price*, 3 B. & Ad. 409; *The Marshalsea case*, 10 Co. Rep. 75; *Thomas v. Hudson*, 14 M. & W. 353; *Ackerley v. Parkinson*, 8 M. & S. 411; *Beaurain v. Scott*, 3 Campb. 888; *Marshall v. Pitman*, 9 Bingh. 595, 2 M. & Scott, 745; *Brittain v. Kinnaird*, 1 Brod. & B. 432, 4 J. B. Moore, 50; *Mould v. Williams*, 5 Q. B. 469; *The Queen v. Dodson*, 9 Ad. & E. 704.

Channell, Serjt., in reply. Reading the local act with the general act, the magistrate was clearly without jurisdiction. If particular property is exempted, it is the same as if it is not within the parish at all: and, if so, there is no ground of appeal, and consequently trespass will lie: *The Governor, &c., of the Poor of Bristol v. Wait*, 1 Ad. & E. 264, 3 N. & M. 359.

WILDE, C. J. The highway-act, 5 & 6 W. 4, c. 50, imposes a general liability upon the inhabitants of every parish throughout the kingdom, to contribute to the repairs of the highways. It is the duty of the surveyors to estimate the probable expenses, and to frame a rate, the allowance of which by two justices is essential to its validity. The application of the fund when raised, is *313] placed under the control of another body, viz. the commissioners. A party who claims to be exempted from this general imposition is bound clearly to establish such exemption. The ground upon which the plaintiff in this case seeks to show that he is not liable for the rate in respect of which this action is brought, is, that, being assessed under the local act of 6 Vict. c. xxxiii., he is, by the 83d section thereof, “released and free from all rates and assessments towards the paving and lighting any other street, &c., within the parish of St. Mary Abbots, Kensington,” in respect of the same

premises. The effect of that provision, it is contended, is, to exempt the plaintiff from being rated under the general highway-act, not because such rate is applicable to the paving of the streets, as stated in the case, but because a portion of the money raised *may be* so applied. *Non constat* that it *will* be so applied. The circumstance of the local act not quite carrying out the intention of its promoters, is no ground for throwing upon the inhabitants of the rest of the parish a burden greater than they ought to bear. It is enough to say that the rate in question is not a rate within the terms or the spirit of the local act, so as to entitle the plaintiff to the exemption he claims. If it had been intended to relieve the inhabitants of the district from rates under the general highway-act, such intention would have been expressed in terms that admitted of no doubt. It seems to me that the plaintiff has failed to establish his right to the exemption he claims. Whether or not he has any other remedy, is not the question before us. I think the defendant is entitled to our judgment.

COLTMAN, J. I am of the same opinion. The surveyor has made, as he was bound to do, a general rate for the repair of the highways of the parish. We have nothing whatever to do with the application of that rate. *The 19th section of the 5 & 6 W. 4, c. 50, authorizes the board to be appointed pursuant to s. 19, "to determine [*314 and direct how and in what manner the highways in the parish, or any or either of them, or any and what part or parts thereof, shall be kerbed or paved with stone or otherwise." If by the conjoint operation of the general and the local act, the money raised cannot legally be applied to the purpose for which it is collected, that may give a right of appeal under the very general words of the 105th section. But I do not think it makes the rate bad.

CRESSWELL, J. I also am of opinion that our judgment should be for the defendant. The plaintiff has occupied property in respect of which, except for some local act, he is liable to be rated under the general act to the repair of the highways. It is for him to establish his exemption. For this purpose he relies on the 88d section of the local act, 7 Vict. c. xxxiii., which enacts "that every inhabitant or owner who shall be assessed for the rates made under this act, for any lands or tenements within the limits of this act, shall be released and free from all rates and assessments towards the *paving and lighting* any other street, road, or place, within the parish of St. Mary Abbots, Kensington, in respect of such lands or tenements." Now, the rate in question is not a rate for "paving and lighting," or for "paving or lighting," any street, &c., but an ordinary highway-rate. It is not contended that the plaintiff is exempted from the ordinary repairs of the highways. This rate was properly made: and the party whose duty it was to make it, has nothing to do with the subsequent application of the money. Neither he nor the magistrate could foresee that

there would be any misapplication of the fund; they could not therefore be trespassers for enforcing the rate.

*315] *V. WILLIAMS, J. I am of the same opinion. The plaintiff contends that he is, by virtue of the 88d section of the 6 Vict. c. xxxiii., exempted from a highway-rate duly made in the ordinary form; and that the word "and" in that section must be read "or." This is not a rate for paving *and lighting*; and *non constat* that the money collected will be improperly applied. It may have been intended to exclude liability in respect of rates imposed under another local act for another part of the parish.

Judgment for the defendant.

EDWARDS v. WARD and Others. *May 4.*

In answer to a rule for judgment as in case of a nonsuit in a country cause for allowing *two assizes* to elapse without proceeding to trial, after notice,—the plaintiff alleged for excuse the uncertainty of the law as to the liability of railway committee-men, and that he was desirous of awaiting the determination of a similar case (the particulars of which, however, were not given,) pending in error from the Court of Exchequer.

The court, holding the excuse to be *per se* insufficient, nevertheless discharged the rule upon a peremptory undertaking, on the ground that the defendants had been tardy in their application.

HORN and *Pashley*, on behalf of two of the defendants respectively, on a former day in the term, obtained rules nisi for judgment as in case of a nonsuit in this case, upon affidavits stating that issue was joined on the 17th of July, 1846, and notice of trial given on the same day for the ensuing summer assizes at Liverpool, and that the plaintiff had neglected to proceed to trial.

J. C. Symons showed cause, upon affidavits stating that the action was brought against the defendants as members of the acting or provisional committee of a certain projected line of railway, on which the plaintiff *had been employed as engineer; that the cause had
*316] not been taken down to trial, in consequence of the uncertain state of the law in such cases; that the plaintiff's attorney was anxious to wait the result of several similar cases now pending in the courts at Westminster, before proceeding to the trial of this cause; that the deponent had been informed, and believed, that the question in issue in this cause was identical with that in a case of *Hooper v. Lamb*, which was tried at the Queen's Bench sittings after last Michaelmas term, and in which a bill of exceptions had been tendered, on the ground that there was no evidence of liability to go to the jury, and which was standing for argument. He submitted, on the authority of *Wynn v. Bellman*, 6 Taunt. 122, and *De Rützen v. John*, 2 H. & W. 331, that the utmost the court could, under the circumstances, require the plaintiff to do, would be, to give a peremptory undertaking to try at the assizes next after the case of *Hooper v. Lamb* should be finally disposed of. And

he stated that a similar course had been recently adopted by the Court of Queen's Bench in a case of *Falkner v. Dow*, and by the Court of Exchequer in a case of *Dean v. Wood*.

Horn and Pashley, in support of the rules, submitted that the affidavits in answer were very unsatisfactory, inasmuch as they did not show with any degree of certainty and precision what was the question to be argued in *Hooper v. Lamb*, which, according to *Wynn v. Bellman*, they ought to have done; and that there was no uncertainty in the law upon this subject, the only difficulty being in its application to the particular circumstances of each individual case.

WILDE, C. J. I must confess I have very considerable doubt whether the affidavits present any excuse at *all for the plaintiff's default. [**317* *Hooper v. Lamb*, like every other action against a committee-man of a railway company, must depend upon its own particular circumstances, and not upon any general principle of law. As, however, the defendants have so long acquiesced in the delay, instead of coming to the court, as they might have done, last term, the justice of the case will probably be met by discharging this rule upon a peremptory undertaking to try at the next assizes.

The rest of the court concurring,

Rule accordingly.

WILLIAM COX v. HUBBARD. *May 8.*

The defendant, who had dealings with A. and B. as partners, afterwards made a contract with A. in B.'s presence, and received letters with reference to such contract bearing the signature of the firm. In an action by B., A., who was called as a witness, stated that he had ceased to be a partner prior to the date of the contract, and that he made it as agent for B.:—*Held* that the jury were warranted in finding that the contract was with B. alone, although there was no precise evidence of the dissolution of the partnership between A. and B.

THIS was an action for goods sold and delivered.

At the trial, before PARKER, B., at the last assizes at Coventry, it appeared that the action was brought to recover 20*l.*, the price of a bolting-drum supplied to the defendant, and 1*l.*, the price of a wheel put to a threshing-machine for the defendant. Prior to the year 1844, Samuel Cox, the father of the plaintiff, had carried on the business of a wheelwright at Baildon. In the course of that year, the defendant agreed with Samuel Cox for the purchase of a threshing-machine for 45*l.*, of which sum 20*l.* was paid down. The machine was fixed up on the premises of the defendant in Nottinghamshire, by Samuel Cox and the plaintiff; and the balance *of 25*l.* was paid by the defend- [**318* ant to Samuel Cox in the presence of the plaintiff; the receipt stating the payment to be to the two. The contract for the bolting-machine was made at this time by Samuel Cox, in the presence of his son; as also was the agreement as to the wheel of the threshing-machine:

and the account was sent in in the joint names. Samuel Cox, who was called as a witness, stated, that, in the year 1844, he transferred the business at Baidon to his son William, by deed. This deed was produced; but, the subscribing witness not being present, and his absence not being satisfactorily accounted for, it was rejected.

On the part of the defendant, reliance was placed upon the receipt above referred to, and upon the circumstance of the contract in question having been made when the father and son were both present, and also upon certain letters addressed to the defendant with reference to the contract, by the authority of the plaintiff, signed "Samuel and William Cox,"—in order to show that the action was improperly brought in the name of William Cox alone.

For the plaintiff, it was insisted that Samuel Cox had acted merely as the agent of the plaintiff.

The learned judge told the jury, that, although the contract was made by the father, still, if he made it as the agent of his son, it was competent to the son to sue alone.

The jury having returned a verdict for the plaintiff,

Whitehurst, on a former day in this term, moved for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. He submitted that the learned judge ought to have told the jury, that, if the plaintiff assented to his father's making the contract as a partner with him, he was estopped from afterwards contending *319] that the contract was made *with himself alone; and that the receipt and the correspondence conclusively showed that the contract really was a contract with the father and son as partners. [COLTMAN, J. You infer that the contract for the bolting-drum was made with the father and the son, because the former dealing appears to have been with both.] The contract now in question was made at the same time as the settlement of the former transaction. In *Bickerton v. Burrell*, 5 M. & S. 888, it was held that a plaintiff who has made a contract as agent for a third person, cannot sue as principal, without giving notice to the defendant, before action brought, that he is the party really interested. And Lord ELLENBOROUGH said: "Where a man assigns to himself a character of agent to another whom he names, I am not aware that the law will permit him to shift his situation, and to declare himself the principal, and the other to be a mere creature of straw." [CRESSWELL, J. That doctrine was very fully discussed in the Court of Exchequer, in the recent case of *Rayner v. Grote*, 15 M. & W. 359. There, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A.: and it was held that the plaintiff might sue in his own name for the non-acceptance of, and non-payment for, the

residue of the goods.] If the father and son had both sued here, the evidence given would clearly have proved a joint contract.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

*This was an application, in the absence of the lord chief justice, for a new trial, on the ground of a misdirection by the learned judge who tried the cause, or on the ground that the verdict was against the weight of evidence. [*320]

The action was brought by one William Cox for the price of certain goods supplied to the defendant. The case of the plaintiff was, that Samuel Cox, the father of William Cox, had made the contract for the delivery of the articles in question, as the agent of his son; and the learned judge told the jury, that, if such was the case, the plaintiff was entitled to recover. This was complained of as a misdirection; and it was contended, that, as the contract was made at a time when the father and son were both present, the contract must be considered to have been made with both of them, and not by the one as the agent of the other; and, further, that the various documents and letters produced in evidence, showed that the contract was with the father and son, and not with the son.

But it appears to us that the circumstances of the son's being present with his father when the contract was made, can amount to no more than evidence that the contract was with the father and son jointly; and we think there is no ground for saying that the jury were misinstructed in point of law, when they were told, that, if the contract was made by the father as the agent of his son, the son might sue upon it.

With reference to the second ground of the application,—we have consulted the learned judge as to his opinion of the effect of the evidence; and we learn from him that he is satisfied with the verdict, and thinks it was quite right.

In this case, therefore, there will be no rule.

Rule refused.

*MUNDEN *v.* CHARLES FREDERICK AUGUSTUS [*321]
WILLIAM, Duke of BRUNSWICK and LUNEBURG,
sued as CHARLES FREDERICK AUGUSTUS WILLIAM
D'ESTE, commonly called The Duke of BRUNSWICK. *May 8.*

The defendant, having entered an appearance in person as "C. F. A. W., Duke of Brunswick and Luneburg, sued as C. F. A. W. D'Este, commonly called the Duke of Brunswick," delivered a plea to the jurisdiction, with an affidavit of verification, respectively intitled "C. F. A. W., sovereign Duke of Brunswick and Luneburg, sued as C. F. A. W. D'Este, commonly called the Duke of Brunswick."

The plaintiff, treating the plea as a nullity, signed judgment:—The court refused to set aside the judgment, without an affidavit of merits.

An affidavit with a jurat signed, "A. B., a coun^r. &c.," is sufficient.

THIS was an action of debt upon an annuity deed.

The writ of summons described the defendant as "Charles Frederick Augustus William D'Este, commonly called the Duke of Brunswick." He appeared in person by the name and description of "Charles Frederick Augustus William, Duke of Brunswick and Luneburg, sued as Charles Frederick Augustus William D'Este, commonly called the Duke of Brunswick."

The declaration commenced by stating that the plaintiff, by his attorney, complained of "Charles Frederick Augustus William, Duke of Brunswick and Luneburg, the defendant in this suit, who, by the name and description of Charles Frederick Augustus William D'Este, commonly called the Duke of Brunswick, had been summoned," &c.

The defendant pleaded as follows:—

"In the Common Pleas.

Charles Frederick Augustus William, sovereign Duke of Brunswick and Luneburg, sued as Charles Frederick Augustus William D'Este, commonly called the Duke of Brunswick,

At the suit of

Charlotte Munden.

*322] "The defendant, in his own proper person, comes *and says that this court ought not to take cognisance of this action, because he says, that, at the time of making the said deed in the declaration mentioned, the defendant was a sovereign prince, that is to say, the reigning sovereign duke of the duchy of Brunswick and Luneburg: and the defendant further says the said deed was made by him within his said dominions, that is to say, within the said duchy of Brunswick and Luneburg; and that, from the time of the making thereof, continually, until and at the time of the commencement of this suit, the defendant has been and still is justly entitled to all the rights, prerogatives, and privileges appertaining to him as the Duke of Brunswick and Luneburg; and the defendant further says, that, by reason of the premises, he ought not to be compelled, against his will, to answer to any action for the cause aforesaid before any justice or minister of the queen of this kingdom, or other judge whatsoever, or any court whatever: and this he is ready to verify, &c.; wherefore he prays judgment, if the said court here ought to take cognisance of this action."

The affidavit in support of the plea was as follows;—

"In the Common Pleas.

Between Charlotte Munden, plaintiff,
and

Charles Frederick Augustus William, sovereign Duke of Brunswick and Luneburg, sued as Charles Frederick Augustus William D'Este, commonly called the Duke of Brunswick, defendant.

"Charles Frederick Augustus William, sovereign Duke of Brunswick

and Luneburg, the above-named defendant, of, &c., maketh oath and saith that the plea hereunto annexed is true in substance and in fact.

(Signed) "CHARLES FREDERICK AUGUSTUS WILLIAM,
Sovereign Duke of Brunswick."

*The jurat was—"Sworn at Brunswick House, Regent's Park, in the county of Middlesex, the 26th day of April, 1847, [*323 before me, W. Grant, a com^r. &c."

The plaintiff, treating the plea as a nullity, signed judgment on the 1st of May instant.

Lush, on a subsequent day, obtained a rule calling upon the plaintiff to show cause why the judgment should not be set aside for irregularity. He referred to *The King v. Johnson*, 6 East, 583, 2 J. P. Smith, 591.

Byles, Serjt., now showed cause. This is a dilatory plea, a plea to the jurisdiction, and within the statute 4 & 5 Ann. c. 16, s. 1, which enacts that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable motive to the court to induce them to believe that the fact of such dilatory plea is true. And the proper course, where such a plea is not supported by a proper affidavit, is, to sign judgment: *Richards v. Setree*, 3 Price, 197. Here, there is a variance in the title of the plea and affidavit, arising from the introduction of the word "sovereign." In *Shrimpton v. Carter*, 3 Dowl. P. C. 648, an affidavit intituled "*G. Shrimpton v. William Carter*, the elder, sued as William Carter," the name of the cause being "*G. Shrimpton v. William Carter*," was rejected as being badly intituled. So, in *Bland v. Dax*, 15 Law Journ., N. S., Q. B. 1, "*Bland, deceased, v. Dax*," was held an improper intituling of a rule and affidavits; there being no such cause as "*Bland, deceased, v. Dax*." So, here, there is no such cause as *Munden v. Charles Frederick Augustus William*, "sovereign" Duke of Brunswick and Luneburg.

*Then, the jurat is clearly defective. In *Howard v. Brown*, [*324 1 M. & P. 22, an affidavit of debt sworn before a commissioner in the country, without stating him in the jurat to be a commissioner, was held insufficient. Here, it does not sufficiently appear that the party taking the affidavit was a commissioner: he merely signs his name, with an abbreviated word "com^r." after it, which may mean commissioner, or commoner, or commander, to which he adds an "&c.," which, whatever be its virtue in other respects, certainly does not tend to elucidate the meaning here. [CRESSWELL, J. Expand the "&c.," and then it reads—"a com^r. for taking affidavits in the Court of Common Pleas," which is quite unambiguous.] In *Hill v. Royston*, 7 Jurist, 980, affidavits sworn before a commissioner, and signed by him "A. B., com^r," were held to be insufficient. [WILDE, C. J. In affidavits, it is more common to see the word "commissioner" abbreviated than otherwise. As

the case of *Hill v. Royston* is no where reported but in the Jurist, there must have been something peculiar in it. If it had been understood as a decision to the effect there stated, the reporters we are accustomed to rely on would not have failed to notice it.]

Lush, in support of his rule. Assuming that this plea and affidavit are irregular, the irregularity is not one that entitled the plaintiff to sign judgment: but he should, as in *Poole v. Pembrey*, 1 Dowl. P. C. 693, have applied to the court to set aside the plea. [WILDE, C. J. May not the plaintiff sign judgment, where a plea is delivered which is not a plea in the cause? CRESSWELL, J. If it was competent to the court to give the plaintiff leave to sign judgment, why might he not sign judgment *325] without leave? I invariably refuse such applications at chambers. It is not like the case of a frivolous demurrer. That appears upon the record, and cannot be got rid of by signing judgment.] The variance is quite an immaterial one. [CRESSWELL, J. We cannot inquire into the degree of irregularity.] In a case in 7 D. & R. 511, (*Anonymous*), the defendant, whose Christian name was Edmund, by which name he was sued, delivered a plea commencing, "and the said Edward." The plaintiff, treating this plea as a nullity, signed judgment. Upon a motion to set aside the judgment, the court said: "There was no such person as Edward upon the face of the proceedings, and the word was clearly a mere clerical error, and meant Edmund. If the plaintiff chose to take advantage of such an error, he should have done it in the proper mode, by special demurrer: but it would be too much to allow him to obtain a judgment by such a course as this." [CRESSWELL, J. What would you assign for cause of demurrer in such a case?] The report must be a little inaccurate in that respect. [WILDE, C. J. I have certainly known many decisions to the contrary of that.] In *Dale, qui tam, v. Beer*, 7 East, 333, 3 Smith, 248, a plea intituled "W. Beer at the suit of Thomas Dale," without the addition of the character in which the plaintiff sued, was held to be sufficient. The title does not appear upon the record: it is a mere indication to the attorney of the cause in which it is a proceeding. [WILDE, C. J. And therefore should be accurate.]

Assuming the judgment signed in this case to be regular, it may be set aside upon terms. [WILDE, C. J. The rule is, never to set aside a regular judgment on a plea in abatement.](a) That rule is not inflexible. [Byles, *Serjt., observed that there was no affidavit of *326] merits.] A plea that goes to bar the action entirely, is a plea to the merits. A party is not bound to swear to that which is a mere conclusion of law. Non-delivery of an attorney's bill, (b) the statute of

(a) Yet the judgment for the plaintiff upon a demurrer to a plea in abatement is only a *respondens ouster*.

(b) *Wilkinson v. Page*, 6 M. & G. 1012, 7 Scott, N. R. 961. But see *Beck v. Mordaunt*, 2 Scott, 178, and *Holmes v. Grant*, there cited.

limitations,(a) bankruptcy of a sole plaintiff or defendant,(b) are all pleas to the merits. The very same plea was pleaded in an action between the same parties in the Court of Queen's Bench, and seriously discussed upon a special demurrer to the replication,—when the court took time to consider of their judgment.(c)

WILDE, C. J. Upon the best consideration I can give to this case, it seems to me that the rule must be discharged. The objection to the plea is, the introduction of the word "sovereign," which does not appear to have been done by mistake, but advisedly, for a purpose that may without difficulty be surmised. The plea falls within that class of pleas called dilatory, which require to be verified by affidavit; and the plea and affidavit alike vary from the writ and declaration in the name of the cause. A. B., commonly called by an honorary title, may be a very different person from "A. B., sovereign Duke of, &c." It is a substantial variance. A plea cannot be delivered without being properly intituled with the name of the cause. This is not a mere technical rule; but is obviously founded on good sense and *general convenience. Upon principle, as well as upon authority, it appears [*327 to me that this is not a plea in the cause; and that the judgment, therefore, is regular. We are asked to set aside the judgment, on the ground of merits apparent on the face of the record: and, for this purpose, it is said, no affidavit of merits is necessary. Generally speaking, the court will not set aside a regular judgment without such an affidavit. Suppose this defendant is not *de facto* sovereign Duke of Brunswick and Lunenburg; but that there is another reigning Duke of Brunswick, who is recognised as such by all the powers of Europe, and by England amongst the rest. If we are to take judicial notice of that which is notorious upon the subject, we know that this is so. And, if not, surely it is a case for an affidavit of merits, according to the facts disclosed in the plea itself. I do not assent to the proposition, that every thing that amounts to a legal answer to the action is a plea to the merits. All the practice of the court is to the contrary. There are many cases in which the court has been called upon to determine what is or is not a plea to the merits. But those cases do not affect the present question.

Upon the whole, I think, that, the judgment being regular, an application to set it aside, without an affidavit of merits, cannot be entertained.

The rest of the court concurring,

Rule discharged, with costs.

(a) See *Rucker v. Hannay*, 3 T. R. 124; *Maddocks v. Holmes*, 1 B. & P. 228; *Mackenzie v. Higgins*, 1 Tidd's Pr., 9th edit. 615.

(b) *Willis v. Allen*, 5 N. C. 465, 7 Scott, 474.

(c) In that case the Court of Queen's Bench on this day (8th May) gave judgment,—holding the plea to be bad in substance. See *Munden v. The Duke of Brunswick*, 16 Law Journ. N. S., Q. B. 1.

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SPOONER v. PAYNE. *May 8.*

By an indenture of submission, it was left to the arbitrator to find, amongst other things, whether the plaintiff was liable to discharge a sum of money secured by a mortgage executed by him *on or about the 29th of September, 1818*. The arbitrator found that the plaintiff "was not liable to discharge a sum of money secured by mortgage executed by him *on the 26th of September, 1817*, which was by the defendant produced to me as the mortgage in the said indenture mentioned as, and by the plaintiff admitted to be, the mortgage executed by the plaintiff *on or about the 26th of September, 1818*. One deed only was mentioned in the indenture of submission. Upon a plea of *nul tiel agard*:—*Held*, that the arbitrator had substantially decided the matter referred to him.

To dispense with calling the attesting witness to an indenture of submission, (who was the son of the defendant,) the plaintiff proved that repeated attempts had been made to find him, in order to serve him with a *subpoena*, by calling at his father's house and at several other places where he had resided, and also at a hospital at which he was, as a student, in the habit of attending lectures; and that, these attempts failing, a summons had been taken out, calling on the defendant to admit the execution of the indenture, on which the judge endorsed, "No order; the defendant refusing to give any information:"—*Held*, that enough had been done to justify the reception of the indenture, upon proof of the handwriting of the subscribing witness.

THIS was an action of debt upon an award. Plea, that the arbitrator did not make the award.

The cause was tried before PARKE, B., at the last assizes at Warwick. Under the submission, which was by deed, several questions were presented for the decision of the arbitrator, one of which was—"whether the said James Spooner (the plaintiff) is now liable to discharge a sum of money secured by a mortgage executed by him to the testatrix, *on or about the 29th of September, 1818*." The arbitrator found "that the said James Spooner was not, on the 6th of February, (the date of the submission,) nor now is, liable to discharge a certain sum secured by mortgage executed by him to the testatrix *on the 26th day of September, 1817*, which was by the said C. H. Payne (the defendant) produced to me as the mortgage in the said indenture mentioned as, and by the

*329] said James Spooner admitted *to be, the mortgage executed by the said James Spooner to the said testatrix *on or about the 26th of December, 1818*."

There was no averment in the declaration that the deed referred to by these several dates was the same deed. There was, however, only one deed mentioned in the indenture of reference.

On the part of the defendant, it was insisted that the award did not determine the question submitted to the arbitrator, as to the liability of the defendant on the mortgage of the 29th of September, 1818.

The learned baron, upon this point, ruled that the award was sufficient, and so directed the jury.

The subscribing witness to the indenture of reference was not called; but it was proposed to prove his handwriting. To dispense with his evidence, it was proved that the subscribing witness was the son of the defendant, and a student at St. George's Hospital, where he was in the habit of attending lectures; that a person went to the hospital for the purpose of serving him with a *subpoena*, and waited there several hours,

on seven different occasions, but could not meet with him; that the same party also called, for the same purpose, at No. 1 Clement Street, Pentonville, where he was described in an affidavit to have lived, and also at two other places where he had formerly resided, but without effect; and that repeated inquiries had been made for him at the defendant's house, and the *subpœna* shown to the mother and brother of the witness, but that no information could be obtained from them. It further appeared that a summons had been taken out before ERLE, J., calling upon the defendant to admit the execution of the indenture, or to declare where the subscribing witness was; and that the defendant's attorney, who attended the summons, refused to give the required information; whereupon the summons was *endorsed, "No order; [*330 the defendant refusing to give information."

The learned baron thought there was ground for believing that the subscribing witness was kept out of the way by collusion with the defendant, and that enough had been done by the plaintiff to justify him in receiving proof of his handwriting, which he accordingly did.

A verdict having been found for the plaintiff, damages 333*l.* 10*s.*,

Humfrey, on a former day in this term, moved for a new trial, on the grounds of misdirection, and the improper reception of evidence. As to the first point, he submitted that the award was bad, inasmuch as the arbitrator professed to adjudicate upon a deed different from that mentioned in the indenture of reference. [V. WILLIAMS, J. The date is merely *falsa demonstratio*.]

As to the subscribing witness—enough clearly was not done to justify the learned judge in dispensing with the ordinary legal proof of the deed. The courts formerly adhered to the rule very strictly. By degrees it has been considerably relaxed; but still no case is to be found where the subscribing witness's presence has been dispensed with, he being within the jurisdiction, or at least not shown to be without it, unless it could reasonably be surmised that there had been collusion between him and the opposite party, to prevent his being called. In *Cunliffe v. Sefton*, 2 East, 183, which was an action on a bond, evidence was offered, that diligent inquiry had been made after one of the subscribing witnesses, at the place of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him;—and this was held to be *sufficient to let in proof of the handwriting of the [*331 subscribing witness, although she had since become interested as administratrix to the obligee, and was plaintiff on the record. But, in the subsequent case of *Pitt v. Griffith*, 6 J. B. Moore, 538, where, in an action of debt on bond, it was sworn that the deponents had learned that the attesting witness kept out of the way to avoid an arrest,—it was held that this was not a sufficient reason for dispensing with the attendance of such subscribing witness, to prove the execution of the

bond by the obligor. PARK, J., there said: "The general rule applicable to cases of this description must be strictly followed, viz. that an attesting witness must be called to prove the execution of a deed, or his absence must be well accounted for. Formerly, proof of the handwriting of an attesting witness was only admissible where such witness was dead; and I can remember the first deviation from that rule, where it was extended to cases where the party was abroad, or out of the jurisdiction of the courts of this country; but I have never known an instance where his testimony has been dispensed with, to prove the execution of a deed, on an affidavit which merely stated that it was believed he kept out of the way in order to avoid an arrest." In *Burt v. Walker*, 4 B. & Ald. 697, the decision proceeded on the ground of collusion. The rule is well illustrated by the case of *Wallis v. Delancy*, 7 T. R. 266, n., cited 1 Stark. Evid., 8d edit. p. 376. There, there were two witnesses to a bond which had been executed in America: it was proved that Rivington, one of the witnesses, was in America, and, to show that William Moreton, the other witness, was also abroad, it was proved that a man of the name of Moreton had lived with Rivington, but it could not be *332] proved that his name was William, or that at the *time of trial he was in England: the handwriting of the other witness was proved; and Lord KENYON held that there was reasonable evidence to go to a jury. [V. WILLIAMS, J., referred to *Miller*, dem., *Miller*, ten., 2 N. C. 66, 2 Scott, 122. In order to dispense with the production of an attesting witness to a will bearing date the 15th of May, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk, in the first place for general information respecting the will, and afterwards for information respecting the witnesses by whom it was attested, and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspaper, but without success; and it was held that sufficient had been done to entitle the party to have the will read, on proof of the handwriting of the witnesses, although the attorney of whom the inquiries had been made stated that one of the witnesses had been examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not have failed to remember, had any strict inquiry been instituted.] The instrument in that case was a will thirty years old, which ordinarily proves itself. (a) [CRESSWELL, J., referred to *Morgan v. Morgan*, 9 Bingh. 359, 2 M. & Scott, 490, where an attesting witness to the execution of a bond could not be found, after diligent inquiry, and proof of his handwriting was held to be properly admitted, although a letter (but not stating where

(a) See *Doe d. Oldham v. Wolley*, 8 B. & C. 22; S. C. per nom. *Doe d. Oldnall v. Deakin*, 2 M. & R. 195, 3 C. & P. 402; *McKenire v. Fraser*, 9 Ves. 5; *Doe d. Spilsbury v. Burdett*, 4 A. & E. 1, 6 N. & M. 259.

he was, or the place from whence it came) had been received from him a few days previous to the trial.]

*COLTMAN, J.(a) It appears to me that this award is sufficiently certain. One of the matters submitted to the arbitrator [*333 was, whether the plaintiff was then liable to discharge a sum of money secured by a mortgage executed by him to the testatrix *on or about* the 29th of September, 1818—not professing to give the exact date. By his award, made many years after the date of the indenture, the arbitrator finds that the plaintiff “was not on the 6th of February, (the date of the indenture of submission,) nor now (the date of the award) is, liable to discharge a sum of money secured by mortgage executed by him to the testatrix on the 26th day of September, 1817,” (which may be the true date—the day of the execution of the mortgage.) If it had stopped there, it would have been free from doubt. But the arbitrator proceeds—“which was by the said C. H. Payne (the defendant) produced to me as the mortgage in the said indenture mentioned, as, and by the said James Spooner admitted to be, the mortgage executed by the said James Spooner to the said testatrix *on or about* the 26th of December, 1818.” That again is somewhat vague. Perhaps this does not very exactly answer to the description of the deed mentioned in the indenture of submission. But, when we find only one deed mentioned in the submission, it seems to me that we cannot entertain a doubt but that the discrepancy has arisen from mere mistake. Substantially the arbitrator has decided the case.

CRESSWELL, J. The arbitrator has substantially decided the whole matter in dispute. He has determined, that, upon the deed produced to him as, and admitted to be the deed mentioned in the submission, the plaintiff was not liable to discharge the sum thereby secured.

*V. WILLIAMS, J., concurred.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

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This was a motion heard before my brothers CRESSWELL, WILLIAMS, and myself, for a new trial, on the ground of misdirection, and for improper reception of evidence. The court were of opinion, for the reasons which they gave on the hearing of the motion, that the direction of the jury was right, but took time to consider whether a rule should be granted on the ground of the improper reception of evidence.

The evidence objected to, was, that of the handwriting of the subscribing witness to an indenture of reference, for whom it was alleged that no sufficient search had been made, to render such evidence admissible. We have since seen the judge's notes, from which it appears that the subscribing witness to the indenture of reference was the son of the defendant, and was a student at St George's Hospital, where he was in the habit of attending lectures; and it was proved that great pains had been taken to meet with him there, a party with a *subpoena* having

(a) Wilde, C. J., was absent.

attended there on the 9th, 16th, 17th, 19th, 20th, 22d, and 25th of the month, and for many hours, for the purpose of serving him, but that he could not be met with. Inquiries were also made at No. 1 Clement Street, Pentonville, where he was described in an affidavit to have lived, and also at No. 17 Denbigh Street, and at No. 7 Belgrave Square, at which places he had formerly lived, but he could not be met with there. It was further proved that inquiries had been repeatedly made at his father's house, and that the *subpoena* had been shown to his mother and brother, but no information could be obtained from them. It appeared

*335] further, that a summons had been taken out *before Mr. Justice ERLE, calling on the defendant to admit the execution of the indenture, or declare where C. H. Payne (the subscribing witness) was; and that the attorney attended the summons, but refused to give any information, whereupon the summons was endorsed by my brother ERLE, "No order, the defendant refusing to give information."

Under these circumstances, we think that all the search was made which could reasonably be expected, and that the judge was well warranted in admitting the proof complained of, especially considering that there was reasonable ground for thinking the witness was by collusion kept out of the way by the defendant, in order to elude the justice of the case; and that evidence of his handwriting was properly admitted, as was done, under somewhat similar circumstances, in the case of *Burt v. Walker*, 2 B. & Ald. 697.

There will therefore be no rule.

Rule refused.

CLARKE v. ALLATT. May 4.

The addition of causes of demurrer after the signature of counsel, does not make a demurrer *special*.

In *assumpsit* on a special agreement, the defendant pleaded non assumpsit, and a special plea, (going to the whole cause of action,) to which the plaintiff demurred. At the trial of the issue of fact, a verdict was found for the plaintiff, with 5*l*. damages; and the defendant afterwards obtained judgment on the demurrer to the special plea: *Held*, that the plaintiff was entitled to the costs of the trial of the issue of fact.

ASSUMPSIT. The declaration stated that, theretofore, to wit, on the 1st of January, 1846, in consideration that the plaintiff, then being a shepherd, and *accustomed to, and skilled in, the care of sheep, *336] at the request of the defendant, had then agreed with and promised the defendant to enter into his the defendant's service, in the capacity of shepherd, at certain wages, and upon certain terms then agreed upon between the plaintiff and the defendant, that is to say, at or for the price or sum of 50*s*. for the then next lambing season, for five weeks next ensuing after the 28th of February then next, he the defendant undertook and then promised the plaintiff to permit and suffer him to enter into and continue in his the defendant's employ, for the said

time, and upon the terms aforesaid: that, although the period and term for and during which he the plaintiff was to be in the said service of the defendant elapsed before the commencement of this suit; and although he the plaintiff had always been ready and willing to enter into and continue in the defendant's service in the capacity and upon the terms aforesaid; yet the defendant did not nor would employ him in his service, but, on the contrary thereof, had wholly refused to permit the plaintiff to enter into his the defendant's service; and that thereby, and by reason of the premises, the plaintiff had not only wholly lost and been deprived of the board and lodging, profits, emoluments, and advantages which might and otherwise would have accrued to him from being in the defendant's said service, but had also been prevented from entering into and accepting any other engagement in the capacity as aforesaid; and that the plaintiff had been and was, by means of the premises, wholly unemployed, and had been and was, by means of the premises, otherwise injured and damnified, &c.

The defendant pleaded—first, non assumpsit—secondly, that, before the commencement of the suit, to wit, on the 1st of January, 1846, it was agreed by and between the plaintiff and the defendant, that the *plaintiff should enter into the defendant's service in the capacity of shepherd, at certain wages, and upon certain terms, that [337 is to say, at and for the price or sum of 50s. for the then next lambing season, for five weeks next ensuing after the 28th of February then next; and, further, that, if one Griffin, to whom the plaintiff then referred the defendant, should, within a reasonable time then next, and a reasonable time before the commencement of the said lambing season, as aforesaid, give to the defendant a character of the plaintiff as a shepherd, reasonably unsatisfactory to the defendant, it should be lawful for the defendant, by giving, within a reasonable time after the making of the said agreement between the plaintiff and defendant as aforesaid, and a reasonable time before the commencement of the said lambing season as aforesaid, notice to the plaintiff of the defendant's election so to do, to put an end to and make void the said agreement, (except as next hereinafter mentioned,) and that thereupon the same should become and be void to all intents and purposes, except that the plaintiff should and might retain to and for his own use a sum of money, to wit, 3s., which the defendant then, to wit, on the day and year aforesaid, paid to the plaintiff for and in the name of earnest-money to bind the said agreement between them; and, in consideration that the plaintiff then promised the defendant to perform and fulfil the said agreement on his the plaintiff's part, the defendant then promised the plaintiff to perform and fulfil the said agreement on his the defendant's part,—which was the same promise of the defendant in the declaration mentioned: that the said Griffin, afterwards, and before any breach of the said agreement, and within a reasonable time next after the making of the agreement,

and a reasonable time before the commencement of the said lambing season as aforesaid, to wit, on, &c., did give to the defendant a certain *338] *character of the plaintiff as a shepherd, to wit, the character following, that is to say, that the plaintiff was as good a shepherd as any one need wish to have, in respect of his skill and knowledge, but that the plaintiff was drunken and neglectful of his duties as a shepherd, which said character then was reasonably unsatisfactory to the defendant; that the defendant thereupon, then, to wit, on, &c., aforesaid, did elect to put an end to and make void the said agreement, except as before in the plea mentioned, and did give, within a reasonable time after the making of the said agreement between the plaintiff and defendant as aforesaid, and a reasonable time before the commencement of the said lambing season as aforesaid, notice to the plaintiff of the defendant's said election as aforesaid, and did then, by the said notice, put an end to, and make void, the said agreement, and the defendant's said promise to perform the same, to all intents and purposes, except as before in the plea mentioned, and the defendant did not nor would employ the plaintiff in his service, and had wholly refused to permit the plaintiff to enter into his the defendant's service, as he lawfully might for the cause aforesaid,—which was the same alleged breach of promise in the declaration mentioned—verification.

The plaintiff delivered a replication and demurrer in the following form:

"The plaintiff, as to the plea of the defendant by him firstly above pleaded, and whereof he hath put himself upon the country, &c., doth the like: And the plaintiff, as to the plea of the defendant by him lastly above pleaded, says that the said last plea is not sufficient in law.

(Signed by counsel.)

"The causes of demurrer to the defendant's last plea, are, that the said plea is an argumentative denial of the promise of the defendant in the count mentioned, and amounts to the general issue, and neither confesses nor *339] *avoids the promise and breach of promise in the count mentioned, but attempts to annex a condition to, and to set up a totally different contract and promise than, the contract and promise in the count mentioned; and that, inasmuch as the said last plea denies the promise, and the said breach thereof, in the count mentioned, as therein laid and alleged, the said last plea should have concluded to the country, and not with a verification: and also that the said last plea is otherwise uncertain, informal, and insufficient."

The defendant having joined in demurrer, the demurrer came on for argument in Hilary term last.

Channell, Serjt., for the defendant, objected that it was not open to the plaintiff, on this demurrer, to urge any objections to the plea but such as were open to him on general demurrer.

Bylea, Serjt., *contrd*, submitted that this in reality was, and was intended as, a special demurrer.

WILDE, C. J. This is clearly a general demurrer only: for, though special causes of demurrer are stated, they are not authenticated by the signature of counsel.

Byles, Serjt., admitting that the plea was not bad on general demurrer, there was judgment for the defendant.

Upon the trial of the issue in fact, at the last summer assizes at Northampton, a verdict was found for the plaintiff, damages 5*l*. On the taxation of costs, the master declined to allow the plaintiff any costs, but allowed to the defendant, not only the costs of the demurrer, but also the general costs in the cause.

Byles, Serjt., on a former day in this term, obtained a rule calling on the defendant to show cause why the *taxation should not be set aside, and the master be at liberty to review his taxation, and why the master should not tax and allow to the plaintiff his costs of and occasioned by the issue in fact joined between the parties, and why such last-mentioned costs should not be deducted from the amount of the defendant's costs, in the event of the defendant's costs, after such taxation, exceeding those of the plaintiff; and why, in case the plaintiff's costs should exceed those of the defendant, the defendant should not pay the amount of such excess to the plaintiff. The learned serjeant relied upon *Bird v. Higginson*, 5 Ad. & E. 83, 6 N. & M. 791. There, to a declaration in two counts, the defendant pleaded two pleas to the first count, and one to the second count. Issues were joined on one plea to the first count, and on the plea to the second count: the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed, and for the defendant on the issue on the second count. Afterwards, on the demurrer to the other plea to the first count, the defendant had judgment. The court held that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleadings) the briefs, witnesses, &c. Lord DENMAN, in delivering the judgment—after referring to the 5th section of the 4 Ann. c. 16,(a) and observing *upon the cases of *Jones v. Davies*, Barnes, 140; *Bartlett v. Spooner*, Bull. N. P. 835, Barnes, 461; *Dayrel v. Briggs*, Bull. N. P. 835; *Duberley v. Page*, 2 T. R. 391; *Benett v. Coster*, 1 Bro. & B. 465, 4 J. B. Moore, 110; and *Hart v. Cutbush*, 2 Dowl. P. C. 456,—said; "These cases show that the construction and practice on the statute of Anne has been, to give the plaintiff his costs on the issues found

(a) The 4th section enables a defendant to plead several matters. And the 5th enacts, * that, if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or, if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him."

for him, whether they be issues of fact or issues of law, even though upon the other issues, the judgment be such as that the defendant has judgment on the whole record:" in effect over-ruling *Cooke v. Sayer*, 2 Burr. 753, 2 Wils. 85.

Channell, Serjt., showed cause. The 74th rule of Hilary term, 2 W. 4, applies only to issues of fact. In *Bird v. Higginson*, the plaintiff was held entitled to costs under the 5th section of the statute of Anne. [V. WILLIAMS, J. What difference is there between several issues of fact, and one issue of fact and one of law?] *Bird v. Higginson* is in conflict with several previous authorities, and has never been acted upon in this court. The decision of the court on the special plea shows that the plaintiff had, in truth, no cause of action at all. Why, then, should he have costs?

Byles, Serjt., in support of his rule, submitted that *Bird v. Higginson* was precisely in point, and was conclusive of the question.

WILDE, C. J. In the case of *Bird v. Higginson*,—which goes very carefully through the several prior authorities, affirming some and over-ruling others,—the Court of Queen's Bench came to a very deliberate *342] *determination that the plaintiff, under circumstances very nearly parallel with those of the present case, was entitled to all the costs of the trial. It would be very inconvenient, if, after that express and maturely considered judgment, we should come to a different conclusion. I therefore think, in deference to that decision, that the present rule,—so far as it seeks that the plaintiff may be allowed the costs of the issue upon which he has succeeded,—ought to be made absolute. If, however, this case is to depend (as I think it does) upon the statute of Anne, I doubt whether the plaintiff is entitled to the latter branch of his rule, viz. that such costs may be deducted from the defendant's costs, or the excess (if there be any) paid to the plaintiff.

The rest of the court concurring,

Rule absolute to review the taxation, "and that the master do tax and allow to the plaintiff his costs of and occasioned by the trial of the issue in fact joined between the said parties." (a)

(a) See *Gregory v. The Duke of Brunswick*, 3 Man. Gr. & S. 481.

*343] *PHILLIPS and Another v. NAIRNE and Another. May 8.

A policy contained a clause, that the ship was to be "allowed to be seaworthy for the voyage." In the course of the voyage she met with a violent storm, by which she was much damaged, and obliged to put into the Mauritius. On examination there, it was found that the ship would require very extensive repairs to make her seaworthy, and that the cost of such repairs would exceed her value when repaired: that many of the beams were broken, and many of the bolts and fastenings loosened; and that, the vessel being old, and in many parts decayed, the decayed parts could not be again made use of, as they would not bear re-bolting, but would require to be replaced with new timbers.

In an action upon the policy, averring a total loss by a peril insured against, the judge left it to the jury to say whether the costs of the repair of the damage arising from the perils insured against would have been greater than the value of the ship when repaired; telling them, that, if they were of that opinion, they should find for the plaintiff,—which they did:—

Held, that this was a correct direction, and the verdict warranted by the evidence; for that the judge was not bound to tell the jury, that, in considering the repairs that were necessary, they must exclude from their estimate all such repairs as were rendered necessary by the decayed state of the ship.

THIS was an action upon a policy of insurance upon the ship *Brox-bournebury*, from London to Bombay and China, and thence back to London. By a clause in the policy, (which, in other respects, was in the ordinary form,) the ship was allowed to be seaworthy for the then present voyage. The declaration averred a total loss by the perils and dangers of the seas, and the violence of the winds and waves.

The defendants, traversing the total loss as alleged, paid 50 *per cent.* into court.

At the trial before ERLE, J., at the sittings in London after Trinity term, 1846, the following facts appeared in evidence:—The *Brox-bournebury*, which was built in 1812, and underwent extensive repairs in 1839 and 1840, sailed from London in January, 1842, arrived at Bombay in June, and proceeded on her homeward voyage on the 22d of March, 1843. In the month of April, she met with a violent storm, by which she received much damage, and was obliged, in consequence, to put *into the Mauritius. On examination of the vessel there, it was found that very extensive repairs would be necessary, in order to render her seaworthy; that many of her beams were broken, and many of the bolts and fastenings loosened; and that, the vessel being old, and, in many parts decayed, the decayed parts could not be again made use of, (as they would not bear re-bolting,) but required to be replaced with new timber. [*344

It also appeared, that, before the commencement of the voyage, a number of additional knees had been placed all over the vessel, for the purpose of strengthening her, which had caused her beam-ends to be so much perforated by the numerous bolts passing through them, that it was impossible to re-fasten the ship with the same beams. The topsides, it appeared, were also old and much decayed, the bolt-holes enlarged, and the fastenings generally loosened, so that new topsides would have been necessary. There was, however, evidence to show that this arose from the straining and working of the ship in the storm; and that, but for that cause, she might have performed the voyage in safety.

The admitted value of the ship was 5500*l.*, and there was evidence that the repairs necessary to enable her to prosecute the voyage would have cost about 4000*l.*, which would be more than her value when repaired.

On the part of the defendants, it was contended, that notwithstanding the clause of warranty in the policy, the underwriters were not liable in respect of such repairs as were rendered necessary by the decayed state

of the ship, but only in respect of damage strictly occasioned by perils of the sea.

The learned judge left it to the jury to say whether the cost of the repairs of the damage arising from the perils insured against, would have exceeded the value of the ship when repaired; telling them, that, if they *345] *were of opinion it would, the plaintiffs were entitled to a verdict.

The jury thereupon returned a verdict for the plaintiffs, damages, 3000*l.*, as for a total loss.

The Attorney-General, in Michaelmas term last, obtained a rule nisi for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. He referred to *Hyde v. The Louisiana State Insurance Company*, 3 Mason, 27, 1 Martin, N. S. 410, cited in 2 Phillips on Insurance, 2d edit. p. 281, and *Parfitt v. Thompson*, 13 M. & W. 392.

Sir *F. Theiger*, *Channell* and *Shee*, Serjts., and *Greenwood*, in Hilary term last, showed cause. The point sought to be made in this case, does not properly arise upon the facts that were before the jury. The *Broxbournbury* was about thirty years old at the time the policy was effected; and she was classed as high at Lloyd's as a vessel of her age could be. The evidence showed clearly that she had received irreparable damage during the storm which she encountered on her homeward voyage: and that the estimated repairs had been rendered necessary solely by sea-damage. The direction of the learned judge, therefore, was perfectly correct, and the conclusion to which the jury came, fully warranted by the evidence. They expressly found that the ship was seaworthy at the time she started from India; but that they could not say whether or not she was so at the commencement of the hurricane. [MAULE, J. Assuming that the evidence showed that the vessel had received no damage that was not the result of the perils of the sea, the direction was undoubtedly right.] The learned judge was not bound, upon this *346] policy, to tell *the jury to distinguish between those repairs that were rendered necessary by sea-damage, and those that were occasioned by the decayed state of the ship's timbers. The object of the underwriters is, to take the opinion of the court upon the stipulation in the policy, that the ship was to be allowed to be seaworthy for the voyage. The effect of the stipulation is, to relieve the owner from the implied warranty of seaworthiness. [MAULE, J. That stipulation does not make the ship less seaworthy than she would have been if the words had not been found in the policy. If they had not been inserted, and there had been no plea of unseaworthiness, the learned judge would have told the jury that the ship, for the purposes of the action, must be taken conclusively to have been seaworthy.] Precisely so. The stipulation excludes the objection of unseaworthiness. It seems to have been first introduced in consequence of the decision in *Mills*

v. *Reebuck*, in 1769, 1 Marshall on Insurance, 2d edit., p. 161, 1 Park Ins., 6th edit. p. 290. *Prima facie*, every ship is to be taken to be seaworthy; *Parker v. Potts*, 8 Dow, 23; *Franco v. Latouche*, Trywh. & Gr. 401. There is, in truth, no distinction between this and the old form of policy, unless something more than seaworthiness is to be implied here. [MAULE, J. There is this difference, that, in the ordinary form, unseaworthiness would be a good plea; and here it would not.] *Parfitt v. Thompson*, 13 M. & W. 392, in effect decides this case. There, in assumpsit against the underwriters of a policy of insurance for a total loss, the declaration stated that the defendants agreed that the ship should be considered, and was thereby allowed, to be seaworthy in her hull, tackle, and materials, for the voyage,—the assured declaring, that, to the best of their belief, and according to their knowledge and information, the ship, at the time of the insurance, was in all respects seaworthy for the voyage: *it then alleged the effecting [347 of the policy, and stated that the vessel, during her voyage, by stormy winds, and tempestuous weather, and by the force and violence of the winds and waves, became leaky, strained, riven and damaged, insomuch that, by means thereof, it became necessary for her preservation for her to sail to the nearest port of safety; that she accordingly sailed to the nearest port of safety, to wit, the harbour of Gambia; that, on her arrival at Gambia, she was unfit to prosecute her voyage, unless great repairs were done upon her; that such repairs could not be done at Gambia; that it was not possible to obtain any repairs sufficient to enable her to proceed on her voyage, or to proceed to any other port to be repaired; that it became expedient and necessary to abandon the voyage and to sell the ship; that the ship was sold; that, by means of the premises, the voyage was not performed, and the vessel was wholly lost to the plaintiff: and it was held that, whether the loss of the vessel was occasioned by unseaworthiness, or by perils of the sea, the defendants were bound by their admission, and could not dispute the seaworthiness. It was there urged in argument that “the learned judge (PATTERSON, J.) misdirected the jury when he stated to them that the defendants’ admission of seaworthiness precluded them from relying upon the fact of her unseaworthiness as an answer to the action; for, that admission was intended to operate only in the event of the loss happening from the perils insured against; but, if the loss was occasioned by unseaworthiness itself, the defendants could not be prevented by their admission from setting up the fact of her being unseaworthy, as an answer to the action.” But POLLOCK, C. B., said; “I cannot assent to the construction of the defendants’ admission of unseaworthiness, which has been contended for. It seems to me that that admission enures for all purposes, and amounts to a dispensation *of [348 the usual warranty of seaworthiness. I cannot think the parties intended, that, if the unseaworthiness alone were the cause of the

loss, the plaintiff should have no right to recover. It appears to me, that, if the vessel had foundered in a perfectly calm sea, from a leak occasioned by rottenness, on the day after the policy was effected, the underwriters would have been liable." [MAULE, J. The stipulation in question does not import any particular state of repair; but that, whatever may be her state of repair, the ship is to be considered as seaworthy—not that all her timbers are sound, but that she is seaworthy. Suppose the ship had gone down without any visible cause; would it have been open to the underwriters on such policy to say that the loss arose from natural decay? If the evidence raised the question, the proper mode of directing the jury, I apprehend, would be, that, if the vessel was so damaged by a peril of the sea, that she could not prosecute her voyage without an expenditure of money exceeding her value when repaired, then they must find a total loss. That would be a much more favourable direction for the plaintiffs than that which the jury in this case actually did receive. A loss arising from the worm—*Rohl v. Parr*, 1 Esp. N. P. C. 445—or from rats eating holes in the ship's bottom—*Hunter v. Potts*, 4 Campb. 203,—is not within the perils insured against by the common form of policy. But a loss arising from a capture by pirates—*Pickering v. Barkley*, 2 Roll. Abr. 248, translated, 16 Vin. Abr. 203, pl. 10,—or by a vessel mistaken for an enemy—*Hagedorn v. Whitmore*, 1 Stark. N. P. C. 157—or from an accidental collision—*Buller v. Fisher*, 3 Esp. N. P. C. 67; *Smith v. Scott*, 4 Taunt. 126—or from the ship being sunk at sea by another ship firing upon her, supposing her to be an enemy—*Cullen v. Butler*, 5 M. & S. 461—*349] is within the policy. [MAULE, J. In *Butler v. *Wildman*, 3 B. & Ald. 398, the captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw them into the sea, and was immediately after captured: in an action upon a policy of insurance upon Spanish property, subscribed by British underwriters, who, at the time of effecting the policy, knew that the assured were Spaniards, and that Spain was at war with the state to which the capturing vessel belonged, it was held that this was a loss by jettison, that term in a policy of insurance signifying any throwing overboard of the cargo for a justifiable cause,—that it was a loss by enemies,—and that, if not by jettison, in the strictest sense, it was something of the same kind, and therefore came within the words "all other losses and misfortunes." Wherever the sea itself is the immediate cause of the loss, though something else may have contributed to it, it is within the policy. In *Phillips v. Barber*, 5 B. & Ald. 161, which was an action upon a policy on ship, in the usual form, for twelve months, at sea and in port, the loss averred in the first count was—that, the ship having arrived at the harbour of St. John, New Brunswick, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock,

there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c. Upon demurrer to this count, it was held that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes," &c., for which the underwriters were liable. There was a second count alleging a loss by perils of the sea generally, to which the general issue was pleaded.

[*350
*Upon the trial of that issue, the facts proved were the same as those stated in the first count, with the addition that there was between two and three feet depth of water in the graving-dock, at the time the ship was blown over. Upon a motion to enter a verdict for the plaintiff on the second count upon this evidence, the court held with the utmost distinctness that this was not a loss by perils of the sea,—distinguishing the case of *Fletcher v. Inglis*, 2 B. & Ald. 815, on the ground that "the ship there was in the ordinary course of her voyage when the damage happened, which was not the case here."] In *Walker v. Maitland*, 5 B. & Ald. 171, it was held that the underwriters are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. ABBOTT, C. J., there says: "The immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the quantum of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. I cannot distinguish this case from that of *Rusk v. The Royal Exchange Assurance Company*, 2 B. & Ald. 78: there, the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the under- [*351
writers were held to be liable. Here the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think the underwriters are liable." And BAYLEY and HOLROYD, Js., concurred. To apply that doctrine here: suppose the Broxbournebury had gone down in the hurricane, which a stouter vessel would in all probability have ridden out in safety, would not that have clearly been a loss by the perils of the sea? Or, suppose she had sunk in shallow water, where she might have been weighed at small expense, and repaired, if a stout and good

ship; but, in consequence of the decayed state of her timbers, she could not be raised so as to be made serviceable; would not that equally have been a total loss by a peril insured against? The underwriters knew all the circumstances relating to the ship—her age, and the repairs that had been done on her: and, though her timbers might have been somewhat decayed, if she had not encountered the hurricane, it is highly probable that they would have enabled her to reach her destination in safety. In *Somes v. Sugrue*, 4 C. & P. 276, a ship was disabled at a place where she could only be repaired at such an expense as no prudent man would have been justified in incurring; and that was held to be a total loss by perils of the sea. The point now in question was expressly decided in a case of *Peele v. The Merchants' Insurance Company*, 3 Mason, 27, 1 Martin, N. S. 410, (cited in 2 Phillips on Insurance, 2d edit. p. 279,) before the circuit court of the United States for the district of Massachusetts. There, at the time of sailing on a voyage from New York to Curaçoa, the vessel's "bottom was a little worm-eaten, but she was a staunch, tight, and strong vessel." She was compelled to put into Kingston in a damaged state, where, in the opinion *352] of the *master and other masters of vessels, it would have cost more than her value to repair her; and she was accordingly sold, and the assured upon her abandoned to the underwriters. A question was made whether the repairs rendered necessary on account of the vessel's being worm-eaten, should be included in the estimate of the expense of repairs, by which the loss should be determined to be partial or total. The jury were told, (a) "that, if, in calculating the repairs, they believed any were necessary on account of injuries received from worms, prior to the vessel's sailing, the expense of such repairs should not be included in the estimate." And Mr. Justice LIVINGSTON gave the opinion of the court, that this direction to the jury was wrong. He cited Millar, page 136, n., for the doctrine that the underwriter "is responsible for pre-existent defect, unless it goes so far as to make the ship not seaworthy. Mr. Justice LIVINGSTON proceeds: "It may seem hard to hold an insurer liable for the defective nature of the thing insured; but, so long as the subject is seaworthy, is it not a part of his contract, that, in case of accident, he will defray all the expenses of placing her *in statu quo*? If she be injured, the repairs being rendered necessary by a peril insured against, they ought to be made, without any other examination as to her antecedent state, except to determine the fact of her being seaworthy. I adopt as a general rule, that, if the old injuries are such as to render the vessel innavigable, no deduction is to be made on that account from the cost of repair." The principle laid down in that case is not at all impugned by that of *Hyde v. The Louisiana State Insurance Company*, 3 Mason, 27, 1 Martin, N. S. 410; cited in 2 Phillips on Insurance, 2d edit. 281.

(a) By Mr. Justice Story.

The Attorney-General, Byles, Serjt., and James Wilde, in support of the rule. To entitle the assured to *recover as for a total loss in this case, there must have been a total loss *by the perils of the sea*. [*353] And it makes no difference that this is a valued policy : *Allan v. Sugrue*, 8 B. & C. 561, 3 M. & R. 9. [MAULE, J. That is a point too well established to be contested.] The evidence conclusively showed that the rotten and decayed state of the ship's timbers, and not a sea peril, was the proximate cause of the loss. The learned judge was clearly wrong in his construction of the warranty contained in this policy. It is not a warranty of actual continuing seaworthiness : it is merely intended to get rid of the effect of the noncompliance with the implied warranty that attaches to every policy : it is not a warranty that the vessel shall be taken to be seaworthy during the voyage ; but that she shall be considered as seaworthy *for* the voyage. It is, in truth, as has been already remarked by Mr. Justice MAULE, the same as an ordinary policy, without a plea of unseaworthiness. The only consequence of a noncompliance with the implied warranty, is, that the risk never attaches. That being so, the learned judge who tried the cause was clearly wrong in treating the stipulation as a conclusive admission of seaworthiness. The nature of the risk incurred by the underwriters is in no degree varied. They are not liable for a loss arising from rotten and decayed timbers. Put the case of a vessel in a decayed state sailing on a foreign voyage, and encountering a storm in which she springs a mast : putting into a port to repair the disaster, she is surveyed, and found to be so completely rotten as to be incapable of proceeding on the voyage : in that case, the underwriters would clearly be liable only in respect of the damage done to the mast ; but, if the direction in this case be correct, they would be liable to the extent of the full value of the ship. In the case of a *partial* *loss, it is admitted that rotten timbers are to be replaced at the expense of the owners. Is it to be said that this rule holds [*354] good only until you get to the full value, and that then the whole is cast upon the underwriters ? [MAULE, J. In the case of a partial loss, no doubt there may be repairs for which the underwriters are not liable.] Why should a different rule prevail in the case of a constructive total loss ? [MAULE, J. Whatever adjective you prefix, it is still, in contemplation of law, a total loss ; though, in reality, there is no such thing *in rerum naturâ* as a total loss or destruction of matter, however it may change its form and substance.] By the contract they have entered into, the underwriters have engaged that they will not plead unseaworthiness, and that they will indemnify the assured against sea-damage. [MAULE, J. Against loss by perils of the sea—whether sea-damage or not.] The perils of the sea did not occasion the loss of this ship, but merely exposed her rottenness. In the case of a loss occasioned by the worm, or by rats, the injury would not have been incurred, unless the vessel had been upon the sea ; yet the loss is not a loss by a peril of the

sea for which the underwriter is liable. The effect of unseaworthiness is well illustrated by the *dictum* of Lord ELLENBOROUGH, in *Wedderburn v. Bell*, 1 Campb. 1. In *Livie v. Janson*, 12 East, 648, an American ship, insured from New York to London, *warranted free from American condemnation*,—having, for the purpose of eluding her national embargo, slipped away in the night,—was, by force of the ice, wind, and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards, with great difficulty and expense, got off, and finally condemned by the American government, for breach

*355] of the embargo: and it was held, that, as there was *ultimately a total loss, by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c., which in the event became wholly immaterial to the assured. And in *Green v. Elmslie*, Peake, N. P. C. 212, (cited 12 East, 651, 653,) a ship, insured against capture only, was driven by a gale of wind on the enemy's coast, and there captured; and Lord KENYON held that it was clearly a loss by capture, and not by perils of the sea, although the perils of the sea had driven the vessel within the influence of the peril of capture. In Phillips on Insurance,—a work of considerable authority in the American courts,—the learned author, after referring, amongst others, to the case of *Peele v. The Merchants' Insurance Company* observes:—"The doctrine on this subject is more satisfactorily laid down in a Louisiana case. A steam-boat insured was damaged, by running foul of another, so that it would cost more than she was worth to repair her and make her seaworthy; but the expense of the repairs of the damage done would not be equal to half of the amount at which she was insured in the policy. Had the accident not happened, the boat might have run in the route in which she then was, eighteen months. Mr. Justice PORTER, giving the opinion of the court, said—'We apprehend the rule to be, that, in case an injury is received by an old decayed vessel, which, independent of the accident might have run for some time; if the repairs cannot be put on her in such a manner that the unsound part can be used as formerly, without an expense equal to one half of the value, or, in other words, where the injury which the insurers are obliged to make good, is the cause of the decayed parts requiring repairs, that then the assured may abandon.

*356] But, if repairing the injury which has arisen from *one of the perils insured against will replace her in the same situation she was in before, no matter how unsound all the other parts may be, then the assured shall not have this right; for, all that they can ask is, that the boat may be placed *in statu quo*. The underwriters are not obliged to make good the decayed and rotten parts of a vessel, unless the accident which happens within the perils insured against is of such a nature as will not admit of repairs being placed on her, so that the decayed and rotten parts may be used as formerly.' The court was,

accordingly, of opinion that this was not a case of total loss." The principle there laid down must govern the present case.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

This case was heard before my brothers MAULE, CRESSWELL, V. WILLIAMS, and myself. It was an action upon a policy of insurance on the ship Broxbournebury, from London to Bombay and China, and thence back to London. By a clause in the policy, the ship was allowed to be seaworthy for the then present voyage. The defendants had paid 50 *per cent.* into court. The plaintiffs claimed to recover as for a total loss.

The vessel sailed on her homeward voyage on the 22d of March, 1848. In April following, she met with a violent storm, by which she received much damage, and was obliged in consequence to put into the Mauritius. On examination of the vessel at the Mauritius, it was found that very extensive repairs would be necessary, in order to make the vessel seaworthy; that many of the beams were broken, and many of the bolts and fastenings loosened; and that, the vessel being old, and in many parts decayed, the decayed parts could not be again made use of (as they would not *bear re-bolting,) but required to be replaced [*357 with new timber.

It appears from the report of the learned judge, that, in summing up the case, he left to the jury the question whether the cost of the repair of the damage arising from the perils insured against would have been greater than the value of the ship when repaired,—directing them, if it was greater, that they should find for the plaintiffs. The jury thereupon found for the plaintiffs, for a total loss.

In last Michaelmas term, a rule nisi for a new trial was obtained, on the ground of misdirection, or, if there was no misdirection, then on the ground that the verdict was against the weight of evidence.

The ground on which the direction was complained of, was, that the learned judge ought to have told the jury, that, in considering the repairs that were necessary, they ought to exclude from their estimate all such repairs as the decayed state of some parts of the ship made necessary; and a case in the American courts, of *Hyde v. The Louisiana State Insurance Company*, was referred to in support of the argument.

It appears to us that there is no misdirection in the summing up of the learned judge, as the jury were directed by him to consider the damage arising from the perils insured against, as the matter on which their estimate was to be founded. As, however, it was possible that the jury might have misunderstood the meaning of the judge's direction; we desire to be furnished with the depositions which had been taken in the case, in order to see whether there was any thing in the evidence which might lead us to suppose that the jury had not rightly apprehended the point they had to decide. But, on a careful examination of the evidence,

we see no ground for thinking that there were any repairs in this case included in the estimate, except such as were *fairly referable
 *358] to perils of the sea. It is true that evidence was given that parts of the ship were much damaged; but there is no reason to doubt but that the decayed parts were strong enough to have enabled the ship safely to perform her voyage, if she had not encountered very severe weather. There was evidence that the number of additional knees which had previously been placed all over the vessel, had caused her beam ends to be so much destroyed by the numerous bolts passing through them, that it was impossible to re-fasten the ship with the same beams. This defect in the beams may have been the cause why new beams were necessary; but it was a peril of the sea which loosened the fastenings of the ship, and rendered it necessary that the ship should be re-fastened. So, with respect to the top-sides, which, it appears, it would have been necessary to replace by new ones, and which are shown to have been old and decayed, the fastenings loose, and the holes in which the bolts passed much enlarged,—the evidence seems to us to show satisfactorily that the bad state of the top-sides arose from the working and straining of the ship in the tempest: and the fair result of the evidence is, that it was a peril of the sea which occasioned the necessity for putting in new top-sides.

There is nothing in the view we take of this case which at all conflicts with the case which was cited from the American Courts. In that case, Mr. Justice PORTER, in giving the opinion of the court, is reported to have said, “We apprehend the rule to be, that, in case an injury is received by an old decayed vessel, which, independently of the accident, might have run for some time, if the repairs cannot be put on her in such a manner that the unsound part can be used as formerly, without an expense equal to half the value, or, in other words, where the injury
 *359] which the insurers are obliged *to make good is the cause of the decayed parts requiring repairs; that then the insurers may abandon.”(a)

We are, therefore, of opinion that the verdict in this case is right, and that the rule for a new trial should be discharged.

Rule discharged.(b)

(a) See *Hyde v. The Louisiana State Insurance Company*, ubi supra.

(b) And see *Pothier, Traité du Contrat d'Assurance*, cap. 1, sect 2, num. 50; *Benson v Chapman*, 6 M. & G. 792, 7 Scott, N. R. 625, (now—Trinity vacation, 1848—pending in the House of Lords;) *Manning v. Irving*, 1 C. B. 168, S. C. in error, 2 C. B. 784.

NEWTON and Wife v. BOODLE and Three Others. May 7.

This court will not entertain an application to review the taxation of costs, after a transcript of the record has gone to the court of error.

Judgment for the defendants is signed on the 14th of November, 1846, and, on the 9th of March, 1847, the costs in the cause are taxed:—It is competent to the defendants afterwards to tax their costs of a rule for a new trial obtained by the plaintiffs on the 20th of November, 1846, and discharged, with costs, on the 15th of January, 1847,—the costs of such rule not being costs in the cause.

Two of the defendants pleaded separately, and were represented by different counsel, though by the same attorney:—*Held*, that they were entitled to present for taxation separate bills of costs on the rule. *Sed vide post*, p. 362, n. (a).

The court will not order a taxation to be reviewed, where the amount alleged to have been improperly allowed is less than 40s.

In an action of trespass by husband and wife for an alleged false imprisonment of the latter, a verdict was found for the defendants. The plaintiffs obtained a rule nisi for a new trial, which was discharged with costs. The female plaintiff afterwards obtained a rule nisi to amend that rule by striking out so much of it as directed costs to be paid by her, on the ground that she was no party to it, and that a married woman suing or being sued with her husband, is not liable to costs: The court discharged such rule, *with costs, to be paid by the wife*.

THIS was an action of trespass for a false imprisonment of the female plaintiff under a writ of *ca. sa.* issued against her for the costs incurred by Rowe and Norman, (two of the present defendants,) in the defence of an action brought against them for an alleged libel upon Mrs. Newton, in which action they had obtained a verdict. The other two defendants, Boodle and Norcutt, were, respectively, the attorney and the agent of the defendants in that action. [*360]

In this action the defendants severed in pleading—Boodle and Norcutt pleading together, not guilty, and a justification under the judgment and writ; and also pleading similar pleas, as attorney and agent for the other defendants. At the trial, which took place at the sittings in London after Hilary term, 1845, a verdict was found for the plaintiffs, upon the issue on not guilty, against Boodle, Norcutt, and Rowe, and for the defendant Norman upon that issue, and for all the defendants upon the issues joined on the pleas of justification.

In Michaelmas term, 1846, (a) the plaintiffs obtained a rule nisi for a new trial on the ground of misdirection. This rule was discharged with costs in the following term. (b)

The defendants had signed judgment before the rule for a new trial was obtained, viz. on the 14th of November, 1846, and, after it had been discharged, viz. on the 12th of February, 1847, the costs were taxed, when the master allowed the costs of the defendants Rowe and Norman at 75*l.* 10*s.*, and those of Boodle and Norcutt at 25*l.* 4*s.* 4*d.*, deducting 2*l.* for the plaintiffs' costs of the issue on which they had partially succeeded.

(a) November the 20th.

(b) January the 15th, 1846. *Vide ante*, 3 Man. Gr. & S. 795.

Final judgment was afterwards entered up against both the plaintiffs, whereupon a writ of error was brought, which, when the present rule was argued, was still pending.(a)

Upon the taxation of the costs of the cause, no claim was made on behalf of the defendants, or either of them, in respect of the *861] costs of the rule of Michaelmas term, *1846; but, on the 9th of March last, the defendants attended before the master for the purpose of taxing those costs, when it was urged, amongst other objections, on the part of the plaintiffs, that the rule was improperly drawn up, in so far as it directed the costs of the application to be paid by *both* plaintiffs; and that the female plaintiff had not joined in or appeared upon such rule, and also that she was, by reason of her coverture, exempted from liability for costs; and, further, that, as all the defendants had appeared and pleaded by the same attorney, although they had severed in their pleas, they were only entitled to present one bill of costs. The master, notwithstanding the objections, proceeded with the taxation, and allowed, for the costs of Rowe and Norman, 2*l.* 14*s.*, and for those of Boodle and Norcutt, 13*l.* 5*s.* 4*d.*

Newton, in person, on a former day in this term, moved for a rule nisi to review the original taxation. [WILDE, C. J. The parties being at issue in the court of error, it is now too late to move to review the taxation.] That objection does not apply to the costs of the rule. These should have been claimed at the same time that the costs of the trial were taxed. [WILDE, C. J. They are independent costs on a rule, not included in the judgment. The taxation was perfectly regular. Costs of rules made after judgment are not costs in the cause.] The defendants were not entitled to present two distinct bills for taxation upon this rule. There are many cases to show, that, where several defendants appear by the same attorney, they are not entitled to sever in costs, though they have pleaded separately and appeared by separate counsel. In *Holroyd v. Breare*, 4 B. & Ald. 48, in trespass against A. and B., the two defendants appeared by the same attorney, and pleaded, first, the *862] *general issue, secondly, separate justifications: A. obtained a verdict generally; and B. obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue: and it was held that B. was not entitled to any costs on the issue found for him; and that the master, in taxing A.'s costs, was right in allowing only one half of the attorney's costs for appearance. *Nanny v. Kenrick*, 2 Dowl. P. C. 334, is precisely in point. It was there held, that, where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge. In *Gambrell v. The Earl of Falmouth*, 5 Ad. & E. 403, 6 N. & M. 859, the parties ap-

(a) Judgment was affirmed in the Exchequer Chamber, at the sittings after Trinity term, 1848. Vide post, Vol. V.

peared by separate attorneys. [WILDE, C. J., after consulting the master, observed, that, if any thing had been improperly allowed, the excess was so trifling,—less than 40s.—that the court could not interfere.](a) Then, the female plaintiff being under coverture, and no party to the rule, the rule improperly awards costs to be paid by her: the order as to payment of costs should have been made upon the husband alone. In 3 Blackstone's Commentaries, p. 414, it is said, that, "if an action be brought against an husband and wife for the debt of the wife when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and the wife in execution: but, if the action was originally brought against herself when sole, and, pending the suit, she marries, the *capias* shall be awarded against her only, and not against her husband.(b) Yet, if judgment be recovered against an husband and wife, for the contract, nay even for the personal misbehaviour,(c) of the wife during her coverture, the *capias* shall issue *against the husband only; which is one of the many privileges of Eng- [*363 lish wives." [WILDE, C. J. Is that law at the present day?] In Tidd's Practice, 9th edit., p. 194, the rule is thus stated: "In actions against husband and wife, the husband alone is liable to be arrested on *mesne* process, and shall not be discharged until he hath put in bail for himself and his wife. If the wife be arrested on *mesne* process, she shall be discharged on common bail, and that whether she be arrested singly or jointly with her husband. But, where the wife is taken in execution, she shall not be discharged, unless it appear that she has no separate property out of which the demand can be satisfied, or that there is fraud and collusion between the plaintiff and her husband to keep her in prison." To meet this, it is sworn,(d) that the female plaintiff in this case "hath not any property or interest whatsoever, in possession or enjoyment, or to which she hath been declared entitled separately or independent of her husband; and that, save and except her claims to certain funds settled to her use by her late father, which are now in litigation in a certain cause now depending in the Court of Chancery, the deponents (the plaintiffs) are not aware that she has any title to any property or interest whatsoever apart from or independent of her said husband, but, on the contrary thereof, the deponents believe that she is not entitled to any other interest, in possession, enjoyment, or reversion, save the said claims so in litigation as aforesaid." And it is further sworn that the female plaintiff "gave no instructions for, and took no part whatever in, the said application to this honourable court, to set aside the judgment, and for a new trial."

WILDE, C. J. The attention of the court was not drawn to this point

(a) The Exchequer Chamber, when this case was before them on writ of error, granted a rule nisi to review the taxation, upon this objection. No cause, however, was shown, the parties having compromised.

(b) Citing Cro. Jac. 323. (c) Citing Cro. Car. 513. (d) By the two plaintiffs.

*864] when the rule was discharged. *You may take a rule to show cause why that rule should not be amended, by striking out and altering so much of the same as directs Mrs. Newton to pay costs.

Talfourd, Serjt., showed cause.(a) It is clear, upon the authorities, that a married woman, who, under circumstances like those of the present case,—where she is the real plaintiff, the husband being merely joined for conformity,—obtains a rule which is afterwards discharged with costs, is personally liable to an execution or an attachment for those costs. In *The Queen v. Mary Johnson*, 5 Q. B. 335, a married woman prosecuted another married woman in the Ecclesiastical court; and the defendant was committed under a writ *de contumace capiendâ*, for non-payment of costs. The Court of Queen's Bench set aside the writ for a defect in it, and ordered the prosecutrix to pay the costs. The costs having been taxed, and not paid by the prosecutrix on demand, the court granted an attachment against her. That decision proceeded upon the authority of a MS. note furnished by Mr. Robinson, of the Crown Office, to the following effect:—“Ruth Cope, a married woman, applied to be discharged out of custody upon an attachment, and the court granted a rule nisi. Cause was shown, and the rule discharged with costs. A doubt having suggested itself in the office, as to *awarding the costs either against

*865] Ruth Cope, as a married woman, or against her husband, who (though a co-defendant in the cause) was no party to the application, Mr. Justice BAYLEY's direction was requested by Mr. Dealtry, as to the mode of entering the rule; and his lordship wrote as follows:—‘The husband cannot be ordered to pay the costs. The rule should be discharged, with costs to be paid by the said Ruth Cope. A married woman is not to be entitled to harass a party with a vexatious rule, without being liable to the ordinary consequences of paying the costs if the rule is discharged.’” In *Tidd's Practice*, 9th edition, p. 1026,(b) it is laid down, that, “in an action against husband and wife, they may both be taken in execution: and, when the wife is taken in execution, she shall not be discharged, unless it appear that she has no separate property out of which the demand can be satisfied, or that there is fraud and collusion between the plaintiff and her husband to keep her in prison.” And the law there laid down was adopted by BAYLEY, J., in *Sparkes v. Bell*, 8 B. & C. 1, 2 M. & R. 124. [WILDE, C. J., referred to *Newton v. Rowe* and *Newton v. Boodle*, 16 Law Journ., N. S., Q. B.

(a) The affidavit filed in opposition to the rule, stated, that it was believed that the female plaintiff had a vested interest for her life, after the decease of her mother, in the dividends of 2197l. 16s. 3 per cent. Bank Annuities, under a trust deed executed by her deceased father; that the husband had, on various occasions, admitted that his wife claimed an interest in two distinct sums of 2100l. and upwards, and that a suit was then pending before the Master of the Rolls to establish such her right; and that the application for a new trial, and the notice of motion, were made and given by an attorney acting for both plaintiffs.

(b) Citing *Chalk v. Deacon*, 6 J. B. Moore, 128; *Pitts v. Mellor*, 2 Stra. 1167; *Finch v. Dudson*, 2 Stra. 1237; *Langstaff v. Rain*, 1 Wils. 149; *Barriman v. Gilbert*, Barnes, 203; *Anonymous*, 3 Wils. 124; *Roberts v. Andrews*, 2 Sir W. Blac. 720.

146, where it was held that a married woman, when co-plaintiff with her husband, is liable to be taken in execution for costs, under the statute 28 H. 8, c. 15, upon nonsuit, or verdict for the defendant; and that, although she may be entitled to her discharge by reason of her having no separate property, yet the writ of execution, pursuing the judgment, is not void or illegal, and an action on the case for issuing it as without reasonable or probable cause, is not maintainable.]

**Newton*, in support of the rule. The application of Mrs. [*366]
Newton, to be relieved from that part of the rule which directs her to pay costs, does not rest upon the general immunity of married women from the penalties consequent upon an unsuccessful litigation: but, by reason of the special circumstances disclosed upon the affidavits filed in support of this motion, she is clearly entitled to a favourable exercise of the court's equitable discretion. It is distinctly sworn that she took no part in the application to the court, and that she has no separate property out of which these costs can be paid. There is no ground, therefore, for visiting her with the penal consequences of the non-payment of them. *Hoad v. Matthews*, in the Bail Court, 2 Dowl. P. C. 149, is the only modern case that has any distinct bearing on this subject; and there the wife's liability is made expressly to depend upon her being possessed of separate property. *PATTERSON, J.*, there says: "As it does not appear in this case that there is any reason for supposing the husband to collude with the defendant for the purpose of keeping the wife in confinement, the case is reduced to the question whether she has any separate property. She says she has no property in her own right, separate and apart from her husband. The answer to this is, that it is believed she has one-eighth part of certain leasehold property, and that she has a share of certain other property under a will. It is thus left a matter of doubt. It would, therefore, be more satisfactory if she would produce the will. If the property is settled to her sole and separate use, she is not entitled to her discharge; but, if it was not left to her sole and separate use, I think she ought to be discharged. The burden of showing that the property is for her separate use, is thrown on the other side. The rule will, therefore, be absolute for discharging *her, unless it is shown within two days that [*367]
the property is settled to her sole and separate use under the will." That is the first instance to be found in the books, of an attempt to take a married woman for the costs of a nonsuit in an action brought by her husband and herself jointly. Upon the authority of that case, the defendants here are bound to show distinctly to the court that Mrs. *Newton* is actually *possessed* of separate property out of which the costs can be satisfied: it is not enough that she has a *claim* to property. In *Cro. Car. 518,(a)* in trespass for assault and battery, against husband and wife, for a battery done by the wife, the defendants being found

guilty, the question was, whether a *quod capiantur* should be entered against husband and wife: and it was resolved that a *quod capiatur* should be against the husband only. And Keeling, clerk of the crown, and Hodsdon, the secondary, informed the court that so were all the precedents, although the wrong is only done by the wife.^(a) Consistent with this is the case of *Harrison v. Almond*, 4 Dowl. P. C. 821, where it was held, that, where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs. LITTLEDALE, J., there says: "The husband is the only person who has any interest in the subject-matter of this action. In the case of any damages being recovered, they will be his property; and, in case of a nonsuit, he will be liable to the costs of it. It may, perhaps, be hard in some instances upon the *368] wife; but that is the consequence of the rule of our *law. I think, therefore, that the proceedings in the present case must be stayed until an indemnity against costs is given to the husband. The court, perhaps, might prevent a release by the husband being pleaded, as he would have no right to release the cause of action, the wife's right surviving after her husband's death." On the same principle, it was held in *Cassidy v. Stewart*, 2 M. & G. 487, 2 Scott, N. R. 482, that process which cannot be enforced cannot regularly issue. There, a *ca. sa.* had issued against a member of parliament (pending his privilege) for the purpose of proceeding to outlawry, and the defendant had been once proclaimed upon a writ of exigent;—and the proceedings were set aside for irregularity, though it was sworn that no *personal* molestation of the defendant was intended whilst his privilege continued. If not criminally liable with her husband, except in cases of murder and treason, it is difficult to perceive upon what principle a wife is to be held liable to an attachment for costs in a civil action brought by or against her jointly with her husband.

WILDE, C. J. The question in this case is a very simple one. It is conceded that the rule which is sought to be altered was regularly made. The motion was made in the cause, for and in the name of both plaintiffs, pursuant to a notice of motion given on behalf of both. Indeed, I am inclined to think that no rule could have been moved for, unless both plaintiffs had been parties to it.^(b) We cannot discuss the authority of the attorney to make the motion in the form he did; particularly as the husband himself appeared before us as counsel. I think *369] he ought not now to be heard to say that he moved for the rule on his own behalf only. *And it is not now stated that the mo-

(a) But see *Hales v. White*, Cro. Jac. 203, and *Mayo v. Coghill*, Cro. Car. 407. In the last mentioned case, the husband was found not guilty, and the wife guilty; and it was held that judgment should be against both, *quod capiantur*.

(b) See *The King v. Lord Cochrane and Others*, 3 M. & S. 10, n.

tion for a new trial was made without the knowledge and assent of the wife. It would be monstrous that the time of the court should be occupied in discussing whether a rule so moved was moved by her authority or not. It was the duty of her advisers to see that the rule was drawn up in the proper form. I think it could not have been in any other form than it was. That the wife is liable to be taken in execution in a case like the present, is quite clear. In *Newton v. Rowe*, 16 Law Journ., N. S., Q. B. 150, PATTESON, J., says: "All the authorities show that the writ of *ca. sa.* against the wife would be a good writ. The question that has been raised in all the cases has been, as to her right to be discharged." And Lord DENMAN, in the same case, said: "The rule laid down by the courts, is, that a married woman taken in execution is not to be discharged, where she has separate property; but it does not therefore follow that the court will discharge her in all cases where she has no such property." Here, it is by no means clear that Mrs. Newton has no separate property. It appears that she is advancing a claim in equity to an interest in a considerable amount of stock. If we were to alter this rule, by discharging her from the liability to costs, what would become of the defendants' remedy for those costs? Is the husband to be permitted to harass them by repeated motions in the wife's name, and so escape costs himself? When Mrs. Newton is taken in execution, if she has the ground for discharge that is suggested, she will have justice done to her. If, at the time she is taken, she is possessed of separate property, she will be properly taken: if she has not, then it will be time enough for her to avail herself of such privileges and immunities as the law gives her. By making the alteration we are asked to make, we should be giving her a present *discharge, to which it may turn out that she is not entitled. This rule [*870 having been improperly moved, I think it should be discharged with costs.

COLTMAN, J. This rule has in my opinion no foundation either in law or in justice. I do not say, that, if the husband were shown to be acting in collusion with the defendants, the court would not interpose for the wife's protection. But there is no ground for any such suggestion as that. The motion was made by the husband, representing himself as appearing for both. I think the rule was properly made. At any rate, it is now too late to call it in question. If Mrs. Newton's name were taken out of the rule, she would be altogether discharged from these costs, notwithstanding she might hereafter become possessed of separate property.

CRESSWELL, J. I also am of opinion that this rule should be discharged. The former rule must be taken to have been moved on behalf of both the plaintiffs. And I think it was properly discharged, with costs to be paid by both.

V. WILLIAMS, J., concurred.

Talfourd, Serjt., asked for the particular direction of the court as to the party by whom the costs of this rule were to be paid.

WILDE, C. J. I think the costs should be ordered to be paid in the same manner as was done in *The Queen v. Mary Johnson*, and the case of *Ruth Cope*, there cited. It seems to me, that, if a married woman comes before the court with an unfounded motion, she ought to be liable to costs. The rule will therefore be discharged, with costs to be paid by Mrs. Newton. We need not now speculate upon what may be the result when the defendants seek to enforce the payment of these costs. Rule discharged accordingly. (a)

(a) A decree having been made by the Master of the Rolls in favour of Mrs. Newton, as to one of the sums claimed, the defendants subsequently obtained an order under the 1 & 2 Vict. c. 110, s. 14, to charge her interest therein with these costs.

MUTTON and Another v. YOUNG. May 8.

On the 16th of January, 1847, the sheriff seized certain goods and moneys of the defendant under a *testatum fl. fa.*, the net proceeds of which he handed over to the plaintiffs in part satisfaction of their judgment. He at the same time seized certain bills of exchange and a promissory note, which, not being due, he retained. On the 3d of February, he received notice that a *fiat* in bankruptcy had issued against the defendants. On the 4th, he was ruled to return the writ; and, on the 11th, he returned what he had done under the writ. On the 18th, he received notice that assignees had been appointed: and the bills and note were then claimed on their behalf. After some negotiation with the solicitor to the *fiat*, the sheriff took out an interpleader summons on the 29th of April:—*Held*, that he had by his laches disentitled himself to relief.

On the 16th of January last, the sheriff of Kent seized, under a writ of *testatum fl. fa.* endorsed to levy 1012*l.* 8*s.*, goods belonging to the defendant which sold for 200*l.* 16*s.* He at the same time seized cash and bank-notes, the property of the defendant, to the amount of 43*l.* 10*s.* 6*d.* The balance, after deducting 13*l.* 3*s.*, the expenses of levy and sale, and sheriff's poundage, was paid to the plaintiffs in part satisfaction of the judgment.

The sheriff also seized certain bills of exchange and a promissory note belonging to the defendant, amounting in the aggregate to 762*l.* 17*s.* 4½*d.* These, not being due, he retained.

On the 3d of February, the sheriff received notice that a *fiat* had issued against the defendant, under which he had been duly declared a bankrupt, and requiring him "not to pay over, transfer, assign, or otherwise part with the possession of any money, bank-notes, bills of exchange, promissory notes, or other securities for money, goods, chattels, or effects levied by him under any writ or writs of *fl. fa.* issued against the defendant, or which might have come to, or should then be in, his custody or possession."

On the 4th of February, the sheriff was ruled to return the writ; and, on the 11th, he returned what had been done under it.

On the 17th of February, the under-sheriff received notice from the

solicitor to the *fiat*, that assignees had been chosen on the preceding day; and he was thereby required to account for and hand over to them "all moneys, bank-notes, bills of exchange, promissory notes, or other securities for money, property, or effects levied under any writ or writs of *fi. fa.* issued against the defendant, and remaining in the possession or under the control of the sheriff, at the time of the issuing of the *fiat*."

On the 19th of February, the agent of the sheriff in London was instructed by the under-sheriff to apply for an interpleader order; but the application was deferred, at the request of the solicitor to the *fiat*, in order to give the assignees an opportunity of investigating the conduct and transactions of the bankrupt, and of inquiring further as to the validity of their claim.

On the 16th of March, the sheriff received a notice from one of the execution-creditors, desiring him not to endorse or deliver to his complainant any of the bills or promissory notes, or money seized or received by him, and requiring him to pay over to the applicant a moiety of such moneys, &c.

On the 19th of April, the London agent received fresh instructions from the under-sheriff to interplead. Some further communication took place between the agent and the assignees, and ultimately, on the 29th of April, an interpleader summons was taken out; which summons was attended by the respective parties, before *MAULE, J., on the 6th of May, when it was objected, on the part of the plaintiffs, [*373 that the sheriff had, by his laches, forfeited his right to relief under the interpleader act, and that he had by his conduct materially prejudiced the position of the execution-creditors.

The learned judge yielded to the objection, and dismissed the summons.

Couch, on behalf of the sheriff, now moved for a rule to the like effect. The sheriff has been guilty of no laches; the 6th section of the 1 & 2 W. 4, c. 58, expressly authorizes the application for an interpleader to be made either before or after the return of the writ. [WILDE, C. J. The complaint is, that, by not selling the bills and promissory note, the plaintiffs are prevented from having the fruits of their execution, which could not have been impeached if the sheriff had done his duty promptly.] The sheriff was not bound to sell the bills: he was perfectly justified in holding them till maturity. [WILDE, C. J. They are goods and chattels.(a) It is the sheriff's duty to turn into money with all convenient speed whatever is capable of being so converted.] The statute 1 & 2 Vict. c. 110, s. 12, which enables the sheriff to seize money and bills, enables him to sue on the bills, but not to sell: it enacts, "that, by virtue of any writ of *feri facias* to be sued out of any superior or inferior court after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execu-

(a) *Vide Bullock v. Dodds*, 2 B. & Ald. 258, 273.

tion thereof may and shall seize and take any money or bank-notes, (whether of the governor and company of the Bank of England, or of any other bank or bankers,) and any checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *feri facias* *shall be sued *374] out; and may and shall pay or deliver to the party suing out such execution, any money or bank-notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *feri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such check, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution, as the case may be, from his liability on any such check, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ, the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and, if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such check, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become *375] liable in consequence thereof, the expense *of such bond to be deducted out of any money to be recovered in such action."

[CRESSWELL, J. If the sheriff has done his duty, he is in no danger. I think we ought not to do any thing to prejudice the plaintiffs' right.]

WILDE, C. J. The sheriff's proper course, when he received notice of the *fiat*, was, to move to enlarge the time for returning the writ. Instead of doing so, having received notice of the *fiat* on the 8d of February, he waits until the 11th, and then returns that he has seized and sold certain goods, chattels, and moneys of the defendant, and has handed the proceeds to the plaintiffs; and that he has also taken bills of exchange and a promissory note, which are not yet due, but remain in his custody; and that the defendant has no goods, &c., in his baili-

wick whereof he could cause the residue of the damages to be levied. Having done this, he enters into a negotiation, not with the plaintiffs, but with the assignees: and, at the solicitation of the assignees, he waits for two months without taking any step; and, it is not until the 29th of April that he applies for the benefit of the interpleader act. Independently of the first default, it seems to me that a sheriff who delays his application at the request and for the interest of one of the parties, places himself out of the protection of the act. If we were to allow the sheriff to interplead in this case, we should be holding out a premium to irregularities and sinister dealings on the part of his officers. Nothing can be more important to an execution-creditor than prompt and diligent proceeding on the part of the sheriff against a debtor who is subject to the bankrupt laws. •

The rest of the court concurring,

Rule discharged.(a)

(a) And see, as to sheriffs, rules, *Johnson v. Brazier*, clerk, 1 Ad. & E. 654, 3 N. & M. 654; *Lewis v. Holding*, 2 M. & G. 882, 3 Scott, N. R. 191; *Melville v. Smark*, 3 M. & G. 57, 3 Scott, N. R. 346; *Brown v. Ludham*, 6 M. & G. 169, 6 Scott, N. R. 934; and the statute 1 & 2 Vict. c. 45, s. 2.

*CUNDELL and Another v. DAWSON. May 8. [*372

A contract entered into in contravention of a statutory provision, whether the prohibition is express, or is implied from the imposition of a penalty, will not support an action.

A statute (1 & 2 Vict. c. ci. s. 3) enacted, "that, with any quantity of coals exceeding 560lbs. delivered by any cart, wagon, or other carriage, within the cities of London and Westminster, or within twenty-five miles from the general post-office, the seller should deliver or cause to be delivered to the purchaser, or to his agent or servant, immediately on the arrival of the cart, wagon, or other carriage in which such coals should be sent, and before any of such coals should be unloaded, a ticket, according to a certain form; and that, in case any such seller should not deliver or cause to be delivered such ticket as aforesaid to the purchaser of such coals, or to his agent or servant, before any part of such coals were unloaded, every such seller should, for every such offence, forfeit and pay any sum not exceeding 20*l*." By the form given, the ticket was required to be "signed" with the name or names of the seller or sellers, and that of the carman, in words at full length:—*Held*, that the neglect to deliver such ticket might be pleaded in bar to an action for the price of the coals.

In debt for goods sold and delivered, the defendant pleaded, that the goods were divers quantities of coals by the defendant purchased of the plaintiffs, and by the plaintiffs sold and delivered to the defendant; that the said quantities of coal were respectively delivered by the plaintiffs to the defendant after the passing of the above act; that each of the quantities of coal so sold and delivered, at the respective times of the sales and of the deliveries thereof, exceeded in weight 560lbs., and that each of the quantities of coals was so delivered, within the city of London, in two carts and two wagons; that the plaintiffs were the sellers of the said quantities of coals; and that the plaintiffs, so being the sellers, did not deliver or cause to be delivered to the defendant, or to his agent or servant, immediately on the arrival of the carts and wagons, and before any of such quantities of coals were unloaded, a ticket with each of the said quantities of coals, nor with any of them, according to the required form, signed by the plaintiffs, with their names in words at full length, according to the statute; and that the defendant, at the times of the said sales and deliveries of the coals, was not a seller of, or dealer in coals, nor did he purchase the same, or any part thereof, at the coal-market:—

Held, that the plea sufficiently alleged an omission to deliver a ticket, in contravention of the statute:

That it properly alleged the want of signature by the sellers:

And that the fact of the defendant being a dealer in coals at the respective times of the sales and deliveries, or of his having purchased the coals at the coal-market,—by which the necessity of delivering a ticket would have been dispensed with,—was sufficiently negatived.

DEBT, for goods sold and delivered, and for money found due upon an account stated.

*377] Pleas—first, never indebted—secondly, payment—*thirdly, to the first count, that the goods in the said first count mentioned to have been sold and delivered by the plaintiffs to the defendant as therein mentioned, were, divers quantities of coals by the defendant purchased of the plaintiffs, and by the plaintiffs sold and delivered to the defendant, on divers days and times, and that the said sum of 50*l*. in the said first count mentioned, wherein the plaintiffs allege the defendant was indebted to them, was and is for the price and value of the said quantities of coals so sold and delivered by the plaintiffs to the defendant as aforesaid, and not otherwise, or for any other goods of any other kind or description whatsoever; that the said quantities of coal were respectively delivered by the plaintiffs to the defendant after sixty days after the passing of a certain act of parliament made and passed in a certain session of parliament holden in the 1st and 2d years of the reign of her majesty, Queen Victoria, intituled “An act to continue for seven years an act for regulating the vend and delivery of coals in London and Westminster, and in certain parts of the adjacent counties,”(a) to wit, on the 1st of June, 1843, and on divers other days and times between that day and the 1st of June, 1844, and before the commencement of this suit; that each of the said quantities of coals so delivered by the plaintiffs to the defendant as aforesaid, on the days and times aforesaid, at the respective times of the sales and of the said deliveries thereof to the defendant as aforesaid, respectively exceeded in weight 560*lbs.*, and that each of the said quantities of coals were (was) respectively so delivered as aforesaid by the plaintiffs to the defendant, within the city of London, by and in divers, to wit, two carts and two wagons; that the plaintiffs were the sellers of each and every *378] of the said quantities of the said coals so sold *and delivered to the defendant as aforesaid; and that the plaintiffs, so being the sellers of the said quantities of the said coals, did not deliver, or cause to be delivered to the defendant, he the defendant being the purchaser of each and every of the said quantities of coals, or to his, the defendant's, agent or agents, or servant or servants, immediately on the arrival of the said carts and wagons in which each of such quantities were respectively sent, and before any of such quantities of coals were unloaded, a paper or ticket with each of the said quantities of coals, or with any or either of them, according to the form in schedule (A.) to the said act annexed, respectively *signed by the plaintiffs*, the sellers

of the said quantities of coals, with their names in words at full length, according to the form and effect of the said statute, but wholly neglected so to do, contrary to the said statute; and that he the defendant, at the times of the said sales and of the said deliveries of the said coals to him as aforesaid, was not a seller of or dealer in coals, nor did he the defendant purchase the same, or any part thereof, at the coal-market—verification.

The plaintiff demurred specially to the third plea, assigning for causes—that it was pleaded to the whole of the first count, which was admitted by the plea to be founded upon several distinct sales and several distinct deliveries of coals at several distinct times, and yet the defendant in and by the plea pretended that the whole of the said sales and deliveries were illegal and void, because the plaintiffs did not immediately on the arrival of the said carts and wagons, and before any of the said quantities of coals were unloaded, deliver to the defendant a paper or ticket, according to the form in the schedule to the said act annexed; and the defendant thereby sought to avoid all the sales and deliveries of the said coals, and all the contracts upon which the plaintiffs had declared in their first count, because they *did not [*379 comply with the enactment of the statute upon the first delivery of the said coals; and it was consistent with the plea, that the plaintiffs, on the second and every subsequent occasion, did deliver a paper and ticket as required by the said statute, and the plea, being bad in part, was bad altogether—that the plea was uncertain and repugnant, in this, to wit, that it was therein alleged that the plaintiffs did not, immediately on the arrival of the said carts and wagons, and before the unloading of any of the said quantities of coals, deliver a paper or ticket, and the non-delivery of the paper and ticket which the defendant there alleged, was a non-delivery after all the carts and wagons had arrived, and before any of the coals were unloaded; and, as it appeared that the said coals were delivered at different times, some of the coals must have been unloaded before all the said carts and wagons had arrived—that the plea was further uncertain, in this, to wit, that it did not appear thereby whether the defendant meant that no paper or ticket was delivered, or that an informal paper and ticket was delivered with the said coals, and the plea by argument and inference admitted that a paper and ticket was delivered with the said quantities of coals, but that such paper or ticket was not signed by the plaintiffs, the sellers thereof, with their names in words at full length—that the said act of parliament in the plea mentioned did not require that any such paper or ticket should be delivered with the coals, as the paper and ticket in the plea mentioned—and that it did not appear that the defendant ever returned or offered to return to the plaintiffs, or was ready to return to them, the said coals.

Joinder in demurrer.

April 23. Unthank, (with whom was Byles, Serjt.,) in support of the

demurrer. This plea is framed upon the 8d section of the 1 & 2 Vict. c. ci. s. 3, which enacts, "that, *with any quantity of coals
 *380] exceeding 560lbs. delivered by any cart, wagon, or other carriage, within the cities of London and Westminster, or within the distance of twenty-five miles from the general post-office, the seller or sellers thereof shall deliver, or cause to be delivered, to the purchaser or purchasers thereof, or to his, her, or their agent or agents, or servant or servants, immediately on the arrival of the cart, wagon, or other carriage in which such coals shall be sent, and before any of such coals shall be unloaded, a paper or ticket, according to the form in schedule A. to this act annexed: (a) and, in case any such seller or sellers do
 *381] *not deliver or cause to be delivered such paper or ticket as aforesaid to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals are unloaded, every such seller shall, for every such offence, forfeit and pay any sum not exceeding 20l.; and, in case the carman, driver of, or other person attending, any such cart, wagon, or other carriage laden with any such coals, to whom any such paper or ticket shall have been given by or by the orders of the seller, in order to be delivered to the purchaser, shall (having so first received the same from the seller or any person by the direction of the seller) refuse or neglect to deliver such paper or ticket to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals shall be unloaded, such carman, driver, or other person so offending, shall, for every such offence, forfeit and pay any sum not exceeding 20l.: provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the

(a) The schedule referred to is as follows:—

"Mr. A. B. [*here insert the name of the buyer.*] Take notice that you are to receive here-with [*here insert the number*] tons [*here insert the name of the coal, if any particular sort is ordered or contracted for, and, if ordered or contracted for as Wall's End, specify the name of the colliery*"] coals in [*here insert the number*] sacks, containing [*here insert the weight*] pounds of coal in each sack.

(Signed) C. D. [*here insert the name or names of the seller or sellers in words at full length.*]

E. F. [*here insert the name of the carman in words at full length.*]

"It is directed, that, with any quantity of coals exceeding 560lbs, a paper or ticket describing the quantity,—and, if any particular sort is ordered or contracted for, the sort of the coals sent by the seller,—shall be delivered to the purchaser, or his agent or servant, before any part of such coals shall be unloaded; that a weighing-machine, or proper scales and weights, shall be carried with every wagon, cart, or other carriage; and the carman is required to weigh gratuitously any sack or sacks of coals which shall be chosen by the purchaser or his agent or servant; and, if any carman refuses to weigh such sack or sacks of coals as aforesaid, or drives away the wagon, cart, or other carriage, before the coals are weighed, or otherwise obstructs the weighing thereof, he is liable to a penalty not exceeding 20l.; also, that a proper machine, or proper scales and weights, for weighing coals, shall be kept at every watch-house or police-station, and at any other place appointed for that purpose by two or more of her majesty's justices of the peace."

* See *Grant*, qui tam, v. *Browne*, 6 M. & G. 774, 7 Scott, N. R. 508.

same at the coal-market, may be delivered without any such paper or ticket." Under some acts of parliament, such as, the attorneys' act, 2 G. 2, c. 28, and the apothecaries' act, 55 G. 3, c. 194,^(a) the non-observance of certain conditions precedent disables the plaintiff from suing. In other statutes, such as, the 17 G. 3, c. 42, for regulating the size of bricks, the prohibition is founded upon public policy; in others, the object of the legislature is the protection of buyers and consumers; in others, again,—the stamp-acts, for instance,—the object in view is the raising and protection of the revenue. All these contain either an express or an implied prohibition *of contracts made in derogation of their respective provisions. In *Swan v. Blair*, [*382 3 Clark & Fin. 610, Lord BROUGHAM says: "There seems to be no reason at all to doubt, that, if, for the purpose of protecting the revenue, any thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it. Thus, if dealing in tobacco without a license, as in *Johnson v. Hudson*, 11 East, 180, is prohibited under a penalty, this will not prevent the person who so deals, from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But, how would it have been if the legislature had provided, that, besides the penalty, all dealing of the forbidden kind should be absolutely void? It is clear, that, in this case, no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect, by making it void; and, even if it had only been forbidden, with or without a penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie, where that prohibition was broken: *Law v. Hodson*, 11 East, 300, 2 Campb. 147.. So it was held that no action was maintainable for printers' work, where the act^(b) requiring the printer's name to be given, had not been complied with,—not following a direction, being held equivalent to disobeying a prohibition: *Bensley v. Bignold*, 5 B. & Ald. 335. But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong *to defeat all legal remedy, as any such prohibition. Be it so that the pro- [*388 vision is to protect the revenue, still, if it operates not by penalty, nor yet by mere prohibition, but declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not, as in *Law v. Hodson*, a consequence drawn by argument from the statutory enactment, but it is the very enactment

(a) See *Walmesley v. Abbott*, 3 B. & C. 218, 5 D. & R. 62, 1 C. & P. 309; *Steel v. Henley*, 1 C. & P. 574.

(b) 39 G. 3, c. 79, s. 27.

itself; it stands in the place of penalty; it is, in truth, the penalty denounced. The wrong-doer, the person breaking the law, forfeits 100*l.*, and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity." No case can be found, nor is there any general principle, by which the mere transgression or disregard of some subsequent formality vitiates or annuls the contract. In *Wetherell v. Jones*, 3 B. & Ad. 221, Lord TENTERDEN says: "Where a contract which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect: and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But, when the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering, by an infringement of the law not contemplated by the contract, in the performance of something to be done on his part." In *Armstrong v. Lewis*, 2 C. & M. 274, 4 M. & Scott, 1, A. and B. carried on the business of a pawnbroker in partnership under a deed: the business was conducted solely by A., and his name alone appeared over the

*384] shop-door and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only; upon a bill of exceptions, the court of error intimated an opinion, that, although the parties might by this contract have rendered themselves liable to penalties imposed by the statute 39 & 40 G. 3, c. 99, yet that, there being no actual agreement for an infraction of the law, the contract was not void. [WILDE, C. J. That was a totally different question. It was there contended at nisi prius, that the contract was usurious—a mere colourable contract of partnership. It was also insisted, that, assuming the deed to constitute a partnership, it was illegal and void, being in express violation of the statutes regulating the trade of pawnbrokers. The court, however, held that the deed was not void, but that a legal partnership existed, although the parties might have incurred penalties by carrying on the trade in an illegal manner. That decision by no means justifies the conclusion you seek to draw from it—that Warner, the secret partner, might recover in respect of contracts made in the course of the trade so illegally carried on. Besides, the Master of the Rolls was not satisfied with the judgment.] As far as it goes, it is a distinct decision that the debt was a subsisting debt: and that the non-observance of the formalities prescribed by the statute, in order to avoid the contract, must have been contemplated at the time. [V. WILLIAMS, J. The question here is, whether a thing done in violation of a provision enacted for the protection of the buyer, can form a good consideration for the promise laid.] In *Fergusson v. Norman*, 5 N. C. 76, 6 Scott, 794, it was held that a pawnbroker who, in taking

pledges, omits to pursue the course required by the 39 & 40 G. 3, c. 99, s. 6, acquires no property in the pledges, and *cannot maintain a lien on them against the assignees of a pawner who afterwards becomes bankrupt. This action is founded upon an executed consideration. It does not appear from this record with requisite certainty that the vendor has committed any offence: for any thing that appears, the carman may have been furnished with a proper ticket. By the 2d section of the 5 & 6 W. 4, c. 19, masters of vessels belonging to British subjects are prohibited from carrying to sea on any voyage any seaman, without first signing the ship's articles: and this court, in *Redmond v. Smith*, 7 M. & G. 457, 8 Scott, N. R. 250, held that a contract of insurance upon a voyage made in breach of these regulations was not therefore void. TINDAL, C. J., there said: "By the sixth plea, the defendants seek to set up as an answer to the action, that the voyage in respect of which the policy declared upon was made, was an illegal voyage, by reason of the non-compliance with the directions of the statute 5 & 6 W. 4, c. 19. There can be no doubt but that a policy effected on a ship upon the prosecution of an illegal voyage, is void, and cannot be enforced in a court of law. It would be singular, indeed, if the main contract should be void, and the collateral contract valid. It may, therefore, be laid down as a general rule, that, where the voyage itself is illegal, an insurance for the voyage is also illegal. There are many cases where that has been held to be undoubted law. Thus, in the time of the last war, policies effected on vessels sailing in contravention of the convoy acts, 38 G. 3, c. 76, and 43 G. 3, c. 57, were held void. So, where the voyage was in breach of the navigation act, 6 G. 4, c. 109, or of the acts regulating the East India Company or the South Sea Company,—acts which had in view the general policy of the realm, and the security and *encouragement of navigation. But it appears to me that the provisions of the statute 5 & 6 W. 4, c. 19, were framed for a collateral purpose only: it was intended to give to seamen in the merchant-service a readier mode of ascertaining and enforcing their rights, and to prevent them from having imposed upon them contracts into which they had never in fact entered." And, after referring to the several provisions of the statute, his lordship concludes—"The non-compliance with these directions of the statute, though it may furnish good ground of action against the master, does not render the voyage illegal." [WILDE, C. J. In *Hinckley v. Walton*, 8 Taunt. 181, a ship sailed from the Downs for Portsmouth without the owners having given a bond conditioned not to depart without convoy, as required by the 43 G. 3, c. 57, s. 5, intending either to join convoy at Portsmouth, or to complete her crew, so as to avail herself of a conditional license she had obtained for sailing without convoy; and it was held that the voyage was illegal.] That proceeded upon the ground of public policy. [WILDE, C. J. In *Cannan v. Bryce*, 3 B. & Ald. 179,

the court took a distinction between mere fiscal regulations and a prohibition of the contract.] That distinction has now been over-ruled. The 25th and 26th sections of the excise license act, 6 G. 4, c. 81,—which subject to penalties any manufacturer of, or dealer in, or seller of, tobacco, who shall not have his name painted on his entered premises in manner therein mentioned, or who shall manufacture, deal in, retail, or sell tobacco without taking out the license required for that purpose,—were held, in *Smith v. Mawhood*, 14 M. & W. 452, not to avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections; their effect being merely to impose a penalty on the offending

*387] party for the benefit of the revenue. “I think,” says PARKE, B., in that case, “the object of the legislature was not to prohibit a contract of sale by dealers who have not taken out a license pursuant to the act of parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue. But, looking at the act of parliament, I think its object was, not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue. The plaintiffs, therefore, would be entitled to recover upon this contract, according to the principle laid down in *Johnson v. Hudson*.” And ALDERSON, B., said: “The question is, does the legislature mean to prohibit *the act done* or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the legislature has merely said, that, where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, &c., painted on it, in letters perfectly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with: and there is no addition to his criminality, if he makes fifty contracts for the *sale* of tobacco in such a house. It seems to me, therefore, that there is nothing in the act of parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites.” In *Law v. Hodson*, it was held, that the statute 17 G. 3, c. 42,—which requires

*388] bricks for sale to be of certain dimensions, and *gives a penalty for the breach of that regulation,—being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. BAYLEY, J., there says: “The policy of the act was, to protect the buyer against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold.” In *Foster v. Taylor*, 5 B. & Ad. 877, 3 N. &

M. 241, which was an action upon a contract for the sale of a quantity of butter, which was resisted on the ground that the butter was contained in casks as to which the statutory regulations had not been observed,—LITLEDALE, J., who, in delivering the judgment, entered into a most elaborate consideration of this question, after referring to *Bartlett v. Viner*, Carth. 252, Skinn. 322; *Law v. Hodson*, *Tyson v. Thomas*, McClel. & Y. 119, and *Little v. Poole*, 9 B. & C. 192, says: "There are several other cases where acts of parliament have been infringed in other respects. In one—of *Langton v. Hughes*, 1 M. & S. 593,—the plaintiffs were druggists, and they sold drugs to the defendants, who were brewers, knowing that they were to be used in the brewing of beer, which was contrary to the provisions of an act of parliament; and Lord ELLENBOROUGH there states that it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action. There are other cases, where contracts have been made on the Lord's day, which are within the statute 29 Car. 2, c. 7; others arising out of transactions connected with smuggling; other cases arising out of transactions where the name of the printer has not been inserted in the document published; others arising out of contracts relating to *unlicensed places of public exhibition or resort, which are carried on in a manner not authorized by law; others arising out of disabilities in attorneys and apothecaries not having the proper certificates to practice; others out of illegal insurances;—the names of which several cases need not be enumerated: and the general principle is laid down, that, where the provisions of an act of parliament have been infringed, no contract can be supported arising out of it." The entire judgment there proceeds upon the illegality of the contract: the plaintiff must have known that he was delivering the butter in illegal casks. [V. WILLIAMS, J. Suppose the coals here were to be delivered upon an executory contract, would not the law imply a delivery according to the statute?] Probably it would. [WILDE, C. J. *Little v. Poole* is rather a strong authority against you. The 47 G. 3, c. 68,—a statute passed for the same object as the statute now under consideration,—recited that the several acts then in force for regulating the vend and delivery of coals, had been found insufficient to prevent the commission of frauds in the vend and delivery of such coals, and that it would tend greatly to facilitate the execution of the purposes intended by the said acts, if the same were repealed, and further and better provisions made for those purposes; and then, by s. 113, enacted that the vendor of coals sold and sent as and for wharf-measure, from any ship, &c., or from any wharf, &c., and to be delivered to the purchaser thereof from any cart, &c., should deliver a printed ticket, and the carman or driver should deliver the same to the purchaser, or his servants, before any part of the coals should be delivered therefrom: it then gave the form of the vender's ticket, which

was required to contain the number of sacks, the name of the coals sent,
 *390] &c., the *name of the vender, and the name of the labouring
 meter; and it subjected any vender of coals who should omit
 to deliver such ticket, to a penalty of 20*l*. The court held, upon the
 authority of *Law v. Hodson*, that the act made it imperative on the
 vender of coals to deliver a vender's ticket signed by the meter; and
 that, the act having been passed to protect the buyer against the frauds
 of the seller, a vender of coals who had delivered a vender's ticket to
 the purchaser, which was not signed by the meter, *could not recover the
 price of the coals from such purchaser.*] That case is virtually over-
 ruled by *Wetherell v. Jones*: the judges evidently abstained from ad-
 verting to it in the last-mentioned case, because it was so unsatisfactory.
 Besides, there was an act of commission—a fraud intentionally perpe-
 trated by the vender, in giving a false description of the coals. [CRESS-
 WELL, J. The decision proceeds on the ground of the non-delivery of
 the ticket.] The protection of the purchaser under the 47 G. 3, c. 68,
 was much greater than that afforded by the 1 & 2 Vict. c. ci. The
 ticket was formerly required to be signed both by the vender and the
 meter. [WILDE, C. J. The ticket remains the same; the weighing-
 machine is merely substituted for the meter. The real question is,
 whether an implied promise can arise out of a delivery that subjects the
 vender to a penalty.] It must be conceded that no case can be found
 affirming that proposition.

The 3d section of the act does not require a ticket upon a sale of
 coals in quantity exceeding a quarter of a ton, but merely when a quan-
 tity exceeding that weight is *delivered* by any cart, wagon, or other car-
 riage. No ticket, therefore, is necessary if the coals are delivered at dif-
 ferent times in quantities less than a quarter of a ton. And here, the
 plea does not allege a delivery of a quarter of a ton at any one time,
 but only that each of the quantities of coals delivered exceeded in weight
 *391] *560lbs., and that each of the said quantities were respectively
 so delivered *by and in divers, to wit, two carts, and two wagons.*
 [CRESSWELL, J. The plea sufficiently alleges that each delivery was of
 a quantity exceeding 560lbs.]

There is nothing in the plea to show that the coals were unloaded by
 the vender or his agent or servant; for any thing that appears, the
 coals may have been taken from the carts by the vendee, or even by a
 stranger, before the carman could deliver the ticket. [WILDE, C. J.
 The breach is alleged in the very words of the statute.] That is not
 in all cases sufficient: *Fletcher v. Calthrop*, 6 Q. B. 880.

The plea points to divers sales at divers times and in divers quan-
 tities: it alleges "that the plaintiffs, so being the sellers of the said
 quantities of the said coals, did not deliver or cause to be delivered, to
 the defendant, he the defendant being the purchaser of each and every
 of the said quantities of coals, or to his, the defendant's agent or agents,

or servant or servants, immediately on the arrival of the said carts and wagons in which each of such quantities were respectively sent, and before *any of such quantities of coals were unloaded*, a paper or ticket with each of the said quantities of coals, or with any or either of them, according to the form," &c. If the plea means "any" of "each" of such quantities, it is good; if any one of the whole quantities, it is bad: and the equivocal expression being pointed out as cause of special demurrer, the objection must prevail. Consistently with the language used, though there may have been an omission to deliver a ticket at the commencement of the delivery, the statute may have been duly complied with afterwards. [CRESSWELL, J. The plea would have been [*392 *unexceptionable if it had alleged that the plaintiffs had neglected to deliver a ticket "before any of such quantities of coals *respectively* were unloaded." The question is whether that is not sufficiently so stated. The words are—"immediately on the arrival of the said carts and wagons in which each of such quantities were *respectively* sent, and before any of such quantities of coals were unloaded." "Any of such quantities" clearly means the whole.

The plea alleges that the plaintiffs omitted to deliver or cause to be delivered a ticket "*signed by the plaintiffs*." This the statute does not require. [COLTMAN, J. The 3d section requires the ticket to be in the form given in schedule A.; and schedule A. requires a signature by the seller, and also by the carman.](a) A signature by one of a firm would suffice; *Smith and Jago v. Brown*, 1 C. & J. 542, or a signature by an agent, the words of the act not expressly excluding that mode of signature, as in *Miles v. Bough*, 3 Q. B. 845. The statute of frauds, 29 Car. 2, c. 3, expressly requires the memorandum to be signed by the party to be charged thereby.(b) So, the 3 Jac. 1, c. 7, s. 11, as to attorneys' bills, requires them to be "subscribed with their hands and names;" and the language of the 2 G. 2, c. 22, s. 23, is, "subscribed with the proper hand of such attorney or solicitor respectively." [WILDE, C. J. Suppose issue were taken on the allegation of signature, what would be the result? No more than this—that the signature must be shown to be such as would satisfy the statute, whatever that might be.]

*The plea negatives that the defendant was a dealer in coals [*393 "at the times of the said sales and of the said deliveries of the said coals to him as aforesaid." It is consistent with this that he was a dealer, and so no ticket necessary, at the time of all the sales and deliveries except one. The negation is too large. [COLTMAN, J. Is this pointed out as ground of special demurrer?] It is not necessary that it

(a) Suppose the vender or the carman to be unable, from physical or other causes, to affix his signature. Vide *Hyde v. Johnson*, 2 N. C. 776, 3 Scott, 289.

(b) Or, under the 4th and 17th sections, by his agent lawfully authorized; or, under the 3d section, by an agent appointed in writing.

should be: *Snell v. Snell*, 4 B. & C. 741, 7 D. & R. 249. [V. WILLIAMS, J. In *Wood v. Peyton*, 13 M. & W. 30, to an action against the maker of two promissory notes, the defendant pleaded, that the said promissory notes *and each of them were and was* obtained from the defendant by the plaintiff's fraud: the plaintiff replied that the said promissory notes *were not* obtained by fraud, *modo et formâ*: and it was held, on special demurrer, that the replication was good, and did not tender too large a traverse. POLLOCK, C. B., says: "The defendant must be understood to mean that which he ought to mean.(a) Then, if the plea be distributive, when pleaded as to both counts, the replication is distributive also; for, it is plain that the plaintiff means to follow the defendant in his pleading. The effect is the same as if the replication had contained the word 'respectively.'" WILDE, C. J. The language of the plea must, if possible, be taken in such a sense as will support it.] That is, where the plaintiff pleads over. [WILDE, C. J. Or does not demur.]

Dowling, Serjt., *contrâ*. The plea is good in substance and in form. Although the breach of mere revenue regulations tending to insure the due payment *of duties imposed upon the manufacture of an excisable article, does not render the trade itself illegal, so as to incapacitate the manufacturer from recovering the price of such article, or from suing upon a guaranty given for the due payment thereof; yet it is clear, from all the authorities, that, wherever a statute imposes a penalty for the non-compliance with a condition precedent, a prohibition is implied, and no contract upon which such prohibition attaches can be enforced in a court of law. Thus, in *Tyson v. Thomas*, M'Clel. & Y. 119, it was held that no action would lie for the breach of a contract for the sale of corn by the hobbett, being in contravention of the provisions of the 22 Car. 2, c. 8, s. 2.(b) And PARKE, B., in delivering the judgment of the Court of Exchequer, in *Cope v. Rowlands*, 2 M. & W. 157, says: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is, expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: *per* Lord HOLT, *Bartlett v. Viner*, Carth. 252, Skinn. 322. And it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The only question is, whether the statute *means to prohibit the contract*." [WILDE, C. J. The inclination of the court, as at present advised, is, that the omission to deliver a ticket precludes

(a) Vide *Hobson v. Middleton*, 6 B. & C. 295, 9 D. & R. 249; *Brandto v. Barnett*, 1 M. & G. 926, 2 Scott, N. R. 96; *Stead v. Poyer*, 1 C. B. 787.

(b) And see *Watts v. Friend*, 10 B. & C. 446.

the plaintiffs from recovering the price of the coals. But, considering the diversity of *dicta* and *decisions upon the subject,— [395 and particularly that of Lord TENTERDEN, in *Wetherell v. Jones*,—we will not pronounce any judgment without taking an opportunity to look into the cases more carefully. If we should entertain any doubt, we will hear you again upon the main point. At present you may confine your attention to the formal objections.]

The plea sufficiently alleges the non-delivery of a ticket previously to the unloading of *any* of the coals. All ambiguity arising from the word “respectively” being found in the wrong place, is removed by the subsequent words, “or with any or either of them.”

The plea negatives the delivery of a ticket, signed by the plaintiffs, according to the form and effect of the statute. That means, without such signature as is required by the 3d section and the schedule together. What that is, is matter of evidence, to be proved at the trial.

Reading it according to the ordinary sense of the language used, the plea negatives the defendant being a dealer in coals at the several times of the sales and deliveries. [V. WILLIAMS, J., referred to *Yates v. Tearle*, 6 Q. B. 282. There, a declaration in case alleged, in all the counts, that the plaintiff held a messuage and premises, with the appurtenances, as tenant thereof to the defendant, at a rent therefore payable by the plaintiff to the defendant; and it complained, in the first count, that the defendant took the plaintiff's goods as and for a distress for alleged arrears of the said rent, whereas no rent was due; in the second count, of an excessive distress for arrears of rent claimed to be due for the said tenements; in the third count, of an irregular sale of goods seized as a distress for alleged arrears of the said rent. The defendant, as to all the counts, traversed *the holding, *modo et forma*: and it was held that the traverse was not too large, as putting in issue the tenancy of all the premises mentioned in the several counts.] [396]

Unthank, in reply. The objection that the non-delivery of a ticket previously to the unloading is not sufficiently alleged, being pointed out as cause of special demurrer, the defect cannot be aided by the interpolation of the words “respectively” or “any.” With regard to the case of *Wood v. Peyton*, it is to be observed that there is a material distinction between a traverse and a plea. In *Carvick v. Blagrove*, 1 B. & B. 531, 4 J. B. Moore, 808, in covenant by the assignee of the lessor against the lessee, for rent arrear, an allegation that the lessor was possessed for the remainder of a term of twenty-two years, commencing on, &c., was held to be material and traversable.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

In this case the plaintiffs have declared in *indebitatus assumpsit* for goods sold and delivered, to which declaration the defendant has pleaded,

in substance, that the goods mentioned in the declaration were certain quantities of coals sold and delivered by the plaintiffs to the defendant on divers days and times, and that the said quantities of coals were respectively so delivered in quantities exceeding in weight 560lbs. each, and that each of the same quantities was respectively so delivered within the city of London in divers, to wit, two carts and two wagons, and that the plaintiffs, being such sellers, did not deliver, or cause to be delivered, *397] to the defendant, or any one on his behalf, immediately *on the arrival of the said carts and wagons, and before any such quantities of coals were unloaded, a ticket, according to the form of the statute of 1 & 2 Vict. c. ci., signed by the plaintiffs, as required by the said statute, and that the defendant, at the time of such delivery, was not a seller of, or dealer in, coals, nor did the defendant purchase the same at the coal-market.

To this plea, the plaintiffs specially demurred, and assigned several special causes of demurrer, which will be presently more particularly adverted to.

The main and general question which arises upon this demurrer, is, whether the plaintiffs are precluded from recovering the price of the coals delivered by them to the defendant, by reason of their having omitted, previous to such delivery of coals, to deliver to the defendant, or some one on his behalf, a ticket referred to in the statute, stating the quantity and description of the coals about to be delivered: and this question depends upon the construction and effect of such statute.

This declaration is not framed upon a special contract, but upon the promise implied by law from the sale and delivery of the coals; and the question therefore is, whether, regard being had to the statute referred to, and to the omission to deliver a ticket in the form mentioned therein, the law will imply a promise to pay for the coals so delivered.

The statutes which have given rise to the question of the right to recover the price of goods by sellers or venders who have not complied with the terms of such statutes, are of two classes,—the one class of statutes having for their object the raising and protection of the revenue,—the other class of statutes being directed either to the protection of buyers and consumers, or to some object of public policy. The present case arises upon a statute included in the latter class.

*398] The statute which governs the present case is the *1 & 2 Vict. c. ci., intituled “An act to continue for seven years an act 1 & 2 W. 4, c. lxxvi., for regulating the vend and delivery of coals in London and Westminster, and in certain parts of the adjacent counties,”—continued by the 8 & 9 Vict. c. ci. There had been some previous statutes passed relating to the same subject for limited periods, one of which statutes was the 47 G. 3, c. lxxviii. These statutes had somewhat varied from each other in regard to the means by which the same general object was sought to be attained; but the legal effect of

an omission to comply with the regulations prescribed in them respectively, must be the same.

It is obvious, from the contents of the statute, that its provisions are directed to the purpose before mentioned, viz. to secure the purchasers of coals from fraud in respect of quantity and quality of the coals; and that the delivery of the ticket is required as a part of the means for the attainment of that object: and that such was the object of the statute, was determined in the case of *Little v. Poole*, 9 B. & C. 192.

The class of statutes enacted simply for the security of the revenue, do not apply to the present case; and various determinations which are contained in the books upon the construction of those statutes, and the effect of a non-compliance with their enactments by the seller of goods, rest upon principles not applicable to the present case; and therefore it will not be necessary particularly to advert to them.

The decisions of cases which have arisen upon the class of statutes which embrace the present case, all recognise the same general principle, and are consistent in the application of it. The case of *Little v. Poole*, before mentioned, was an action for the price of a quantity of coals which had been sold and delivered by the plaintiff to the defendant; and it was contended that the plaintiff was not entitled to recover, because a ticket had not been delivered with the coals, as required by the then existing statute, 47 G. 3, c. lxviii. s. 118. Two tickets were required, under that statute, to be delivered; and the objection was, that one of those tickets, called the vender's ticket, had not been signed by the meter, nor had his name been inserted therein. Upon the argument,—a rule nisi having been obtained in that case to enter a nonsuit,—the various cases of *Law v. Hodson*, 11 East, 300, *Bensley v. Bignold*, 5 B. & Ald. 385, *Langton v. Hughes*, 1 M. & S. 598, and *Cannan v. Bryce*, 8 B. & Ald. 179, were cited and considered; and Lord TENDERDEN, in giving judgment, said: "The regulations prescribed by this act of parliament appear to be intended to prevent fraud in the vend and delivery of coals; and that, for that purpose, it was required that the ticket should be signed by the coal-meter; and that, as the ticket was not signed as required for that purpose, the plaintiff, the seller of the coals, was not entitled to recover." BAYLEY, J., said "the case fell within the principle of *Law v. Hodson*, in which case the court held, that, the policy of the act being to protect the buyer against the seller, it would be best effected by holding that the vender could not recover the value of the bricks which had been delivered, such bricks having been less than the statutable size; and that the object of the legislature in the statute then in question, of the 47 G. 3, c. lxviii., would also be best effected by holding that a seller of coals could not recover the value of them, where he had omitted to deliver a ticket pursuant to the statute." LITLEDALE, J., and PARKE, J., recognised the same principle, and a nonsuit was accordingly entered.

*400] That case appears to the court to have been correctly *decided, and to be directly in point to the present, and that it must govern the decision of it. The statute of 1 & 2 Vict. c. ci., continued by the 8 & 9 Vict. c. ci., has precisely the same object in view as the 47 G. 3, c. 68, and seeks to effect it by similar means, namely, by requiring the seller to deliver to the buyer a ticket in a prescribed form.

The judgment in *Little v. Poole* is consistent with the cases of *Bensley v. Bignold*, *Forster v. Taylor*, 5 B. & Ad. 887, *Marchant v. Evans*, 2 J. B. Moore, 14, *Rex v. The Inhabitants of Gravesend*, 3 B. & Ad. 240, *Cope v. Rowlands*, 2 M. & W. 149, and, we believe, every other case in the books depending upon this class of statutes.

We are, therefore, of opinion that the plea in this case, if well pleaded, furnishes a legal answer to the declaration, and that the judgment of the court must be for the defendant.

It remains to be considered whether the defendant has well pleaded this matter of defence. Various objections of form were taken by the special demurrer, but all save one were disposed of during the argument. The objection that remained for consideration was, that the plea did not distinctly aver an omission by the plaintiffs to deliver a ticket before the unloading of each quantity of coals exceeding 560lbs., but merely negatived the delivery of a ticket before the unloading of any of the whole quantities,—which, it is said, is consistent with an omission to deliver a ticket before the unloading of the first quantity, and a due delivery of a ticket upon the unloading of each subsequent quantity. We think, however, it is averred with sufficient distinctness, that there was an omission to deliver a ticket upon each occasion. The terms of the special demurrer, as far as regards this point, are as follow:—

*401] “that the plea is pleaded to the whole of the first count of the declaration, which is admitted by the plea to be founded upon several distinct sales and several distinct deliveries of coals at several distinct times, and yet the defendant, in and by the said plea, pretends that the whole of the said sales and deliveries are illegal and void, because the plaintiffs did not, immediately on the arrival of the said carts and wagons, and before any of the said quantities of coals were unloaded, deliver to the defendant a paper or ticket according to the form in the schedule to the said act annexed; and the defendant thereby seeks to avoid all the sales and deliveries of the said coals, and all the contracts which the plaintiffs have declared in the first count, because they did not comply with the enactment of the statute, upon the first delivery of the said coals, and it is consistent with the said plea, that the plaintiffs, on the second and every subsequent occasion, did deliver a paper and ticket as required by the statute; and that the plea, being bad in part, is bad altogether.” Such being the form of the special demurrer, let us see how it applies itself to the language of

the plea, which states "that each of the said quantities of coals so delivered by the plaintiffs to the defendant as aforesaid, on the days and times aforesaid, at the respective times of the sales and of the said deliveries thereof to the defendant as aforesaid, respectively exceeded in weight 560lbs., and that each of the said quantities of coals was respectively so delivered as aforesaid by the plaintiffs to the defendant within the city of London, by and in divers, to wit, two carts and two wagons; that the plaintiffs were the sellers of each and every of the said quantities of the said coals so sold and delivered to the defendant as aforesaid; and that the plaintiffs, so being the sellers of the said quantities of the said coals, did not deliver or cause to be delivered to the defendant *(he the defendant being the purchaser of each and every of the said quantities of coals,) or to his the defendant's agent or agents, or servant or servants, immediately on the arrival of the said carts and wagons in which each of such quantities of coals was respectively sent, and before any of such quantities of coals were unloaded, a paper or ticket with each of the said quantities of coals, nor with any or either of them, according to the form in schedule A. to the said act annexed, respectively signed by the plaintiffs, the sellers of the said quantities of coals, with their names in words at full length, according to the form of the said statute, but wholly neglected so to do, contrary to the said statute;" and the plea further avers, "that he, the defendant, at the times of the said sales and of the said deliveries of the said coals to him as aforesaid, was not a seller of, or dealer in, coals, nor did he the defendant purchase the same, or any part thereof, at the coal-market." Now, in considering whether or not the objection urged to this plea is well founded, it is material to attend to the language of the earlier part of it; and we think it will be found in that part of the plea that the deliveries are so severed as to make the subsequent allegation of the plaintiffs' omission to deliver a ticket in respect of each delivery sufficiently distinct. It alleges that "each of the said quantities of coals so delivered by the plaintiffs to the defendant as aforesaid, on the days and times aforesaid, at the respective times of the said deliveries thereof to the defendant as aforesaid, respectively exceeded in weight 560lbs., and that each of the said quantities of coals (that is, each of the said quantities respectively exceeding in weight 560lbs.) was delivered in two carts and two wagons;" and that the plaintiffs being the sellers, "did not deliver or cause to be delivered, to the defendant, or to his agent, &c., immediately on the arrival of the said carts and wagons *in which each of such quantities of coals was respectively sent, and before any of such quantities of coals were unloaded, a paper or ticket with each of the said quantities of coals, nor with any or either of them, according to the form," &c. Now, the first part of the plea speaks, in distinct terms, of each of the quantities respectively exceeding in weight 560lbs., and of each quantity being delivered in two carts and two

wagons, which might well constitute one delivery: and the latter part negatives the delivery of a ticket "with each of the said quantities of coals," that is, with each of the said quantities exceeding in weight 560 lbs., and contained in two carts and two wagons. It therefore appears to us that this negation of the delivery of a ticket before the unloading of any of the quantities of coals, is, in truth, a direct negation of its delivery before the unloading of each of the several quantities.

My brother CRESSWELL reminds me that the plea contains an allegation that the plaintiffs neglected to deliver a note or ticket previously to the unloading of "*any* of such quantities of coals." The negation, therefore, is applied with sufficient distinctness to *each* delivery of coals. (a)

Upon the whole, therefore, it seems to us that the objections of form to the plea, set forth in the special demurrer, are not well founded, and that the plea is sufficient in form as well as in substance. The judgment must, consequently, be for the defendant.

Judgment for the defendant.

(a) Vide *supra*, p. 378.

*404]

*WONTNER v. SHAIRP. May 8.

The promoters of a projected railway company, in June, 1845, issued a prospectus stating the capital to consist of 3,000,000*l.*, in 120,000 shares of 25*l.* each, and stating, amongst other things, that application would be made for a bill to incorporate the company early in the next session; and that, in case parliament should not sanction the undertaking, the money deposited, deducting the necessary expenses attending the projection, would be returned to the shareholders. On the 25th of September, the plaintiff made application to the provisional committee of management for sixty shares, by a letter in the form prescribed in the prospectus, undertaking to accept the same, or such less number as they might appropriate to him, *subject to the regulations of the company*, to sign the necessary legal documents, and to pay, *when required*, the deposit thereon of 1*l.* 7*s.* 6*d.* per share. The committee, by a letter dated the 11th of October, but not sent until some days after, informed the plaintiff that they had allotted him sixty shares, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon was paid on or before the 18th, in default of which the allotment would be forfeited, and the shares disposed of to other applicants. This letter was headed "Not transferable," and, as well as the letter of application, described the concern as one having the amount of capital and the number of shares mentioned in the prospectus. On the 17th of October, the committee published an advertisement in *The Times*, stating that "they had completed the allotment of shares." There was evidence for the jury that the plaintiff saw this notice; and he paid his deposit on the 22d of October. On the 4th of November, the plaintiff signed the subscribers' agreement and the parliamentary contract, by which the committee were empowered, amongst other things, to apply the money received for deposits, in liquidation of the preliminary expenses of the undertaking. A meeting of the shareholders was held on the 15th of December, at which the plaintiff for the first time learned, that, although applications had been made before the 17th of October, sufficient to absorb the whole 120,000 shares, 58,000 only had been allotted; and that, in consequence of the plans and sections not being duly deposited to comply with the standing orders, and the want of necessary funds, the committee were not in a condition to go to parliament. At this meeting, resolutions were proposed expressive of confidence in the committee, and of a desire to proceed. The plaintiff moved an amendment, that, as 58,000 shares only had been allotted, the deposits already received should be returned to the parties who had paid them. The chairman declined to put the amendment; and the original resolutions were carried by a large majority. On the 31st of December, the committee came to the conclusion that to proceed with the undertaking would be impracticable; and, on the 6th of January, the plaintiff brought an action for money had and received against the defendant, a member of the committee of management, to recover back his deposit.

22 C. C. 90, 91.

At the trial, the judge told the jury that the plaintiff was entitled to a verdict, if the defendant knowingly made a false representation which was a material inducement to the plaintiff to pay his money, and if the plaintiff executed the deed under the same belief that induced him to pay the deposit. The jury having found for the plaintiff: *Held*, That the direction was right; and that the judge was not bound to tell the jury whether or not the letters of application and allotment constituted a valid and binding contract: That, the letter of allotment not being an unconditional acceptance of the offer made by the letter of application, the two did not constitute a contract under which the plaintiff could have been compelled to pay the deposit: And that the plaintiff had not, by attending the meeting of the 15th of December, precluded his right to rescind the contract on the ground of fraud.

ASSUMPSIT for money had and received. Plea, non assumpsit. The action was brought by the plaintiff, an allottee of shares in a projected railway company, called "The Direct London and Exeter Railway Company," to recover from the defendant, a member of the managing committee, the sum of 82*l.* 10*s.*, being the amount of a deposit of 1*l.* 7*s.* 6*d.* per share upon sixty shares in the concern allotted to him. [*405]

The cause was tried before ERLE, J., at the sittings at Westminster after Trinity term, 1846. The facts that appeared in evidence were as follow:—

Early in the year 1845, certain persons associated themselves together for the formation of a company to make a direct railway communication between London and Exeter. In the month of June in that year, a prospectus was issued in the following form:—

"Direct London and Exeter Railway Company,
(with extension to Falmouth and Penzance.)

"Capital, 3,000,000*l.*, in 120,000 shares of 25*l.* each.

"Deposit 1*l.* 7*s.* 6*d.* per share.

"(A farther deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons.)

"Provisionally registered pursuant to 7 & 8 Vict. c. 110.

"Provisional Committee.

*[Here followed the names of several persons, including that of the defendant.] [*406]

"Committee of Management.

[Here followed the names of several persons, all of whom were members of the provisional committee, the defendant being one of them. The names of the engineer, solicitors, and bankers were also given; and the prospectus proceeded to disclose the objects of the association, and contained, amongst others, the following statements:—]

"The object of this company is, to establish a railway from London to Exeter direct, through Salisbury and other considerable towns hitherto deprived of that great improvement of the age.

"The most important feature, however, of this undertaking will be, that it will establish an uninterrupted, direct, and speedy communication between the metropolis and our largest maritime ports, Plymouth and Falmouth, and thus form an immediate transit to the extreme part of the West of England.

"The plans, sections, and books of reference will be ready within the time prescribed by the standing orders of parliament, and application will be made for a bill to incorporate the company, early in the next session. The usual power will be taken by the act, to allow interest at 4 *per cent. per annum*, after passing the act, on the amount of the subscriptions paid up, and that no subscriber shall be answerable for more than the amount of his deposit until the act be obtained, and then not beyond the amount of his subscription.

"In case parliament should not sanction the present undertaking,—which every active means will be taken to secure,—the money deposited (deducting the necessary expenses attending the projection) will be returned to the shareholders.

*407] "The deposit of 1*l.* 7*s.* 6*d.* per share will be sufficient *to comply with the standing order of the House of Commons; and, after the bill has passed the Commons, a further deposit of 1*l.* 5*s.* will be made, in order to comply with the regulations of the House of Lords. The committee are unwilling to require the whole deposit earlier than is absolutely necessary."

At the foot of the prospectus was a printed form of application for shares, as follows:—

"To the Provisional Committee of Manangement of The Direct London and Exeter Railway Company.

"Gentlemen,—I request you will allot me — shares of 25*l.* each in the above railway: and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the company; also to sign the necessary legal documents, and to pay, when required, the deposit thereon of 1*l.* 7*s.* 6*d.* per share.

"Name in full.

"Profession, if any, and professional residence, in full.

"Residence, in full.

"Reference.

"Date.

"Signature of applicant."

On the 25th of September, 1845, the plaintiff sent in an application in the form prescribed, for thirty shares; and, on the 10th of October, he applied to one of the committee of management to be allowed to increase the number to sixty.

Some time between the 13th and the 22d of October, the plaintiff received from the secretary of the company a letter of allotment, of which the following is a copy:—

*408]

*"London, 11th October, 1845.

"Direct London and Exeter Railway Company,
(with extension to Falmouth and Penzance.)

"Capital, 3,000,000*l.*, in 120,000 shares of 25*l.* each.

"Sir,—The committee have, at your request, allotted to you sixty shares of 25*l.* each in this undertaking, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or before Saturday, the 18th day of October instant; in default of which, this allotment will be forfeited, and the shares disposed of to other applicants. The bankers will give a receipt for the deposit, in exchange for this letter, which must be left with them.

"I beg also to inform you that scrip for the shares will be delivered to you in exchange for the bankers' receipt, upon your executing the parliamentary contract and subscribers' agreement, of which due notice will be given.

"Be pleased to observe that the bankers' receipt must be produced when you attend to execute the deeds."

The following advertisements appeared in the *The Times* and other newspapers, on the 1st and 17th of October respectively:—

"Direct London and Exeter Railway, with extension to Falmouth and Penzance.

"No further application for shares can be received in this undertaking. The committee of management are now actively engaged in the duties of allotment; but deem it necessary to apprise the public, in advance, in order to prevent disappointment. From the enormous number of persons who have applied for shares, not more than one-tenth of even *bona fide* applications can be entertained."

*"Direct London and Exeter Railway, with extension to Fal-
mouth and Penzance. [*409

"The committee of management hereby give notice that they have completed the allotment of shares, and that the usual letters are this day issued. In the arduous duty of deciding on claims unprecedented, it is believed, in their number and respectability, the committee have been obliged to give a preference to applicants locally interested, and likely to bring to bear for the company a large share of legitimate influence. The numerous persons with undoubted claims on the score of wealth and social standing, whose applications have either been passed over or cut down, are requested to accept this reason as the committee's apology.

"The committee desire to add, that, while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations under Mr. Braithwaite, are so far advanced that the project cannot fail to be placed before parliament in a manner the most satisfactory to the shareholders."

There was no direct evidence that the plaintiff saw either of these advertisements; but it appeared that he took *The Times*. On the 22d of October, the plaintiff paid to the company's bankers 82*l.* 10*s.*, being the amount of the deposit of 1*l.* 7*s.* 6*d.* per share upon the number of shares allotted to him; upon which occasion a receipt in the following form was given to him:—

"6 Great Winchester St., Broad St.

"Direct London and Exeter Railway (with extension to Falmouth and Penzance.)

"Capital 3,000,000*l.*, in 120,000 shares of 25*l.* each.

"Deposit, 1*l.* 7*s.* 6*d.* per share.

"Allotment, No. 29.

Shares, 60.

*"22d of October, 1845.

*410] "Received on account of the provisional committee of The Direct London and Exeter Railway, with extension to Falmouth and Penzance, the sum of eighty-two pounds ten shillings.

"for Curries & Co.

"£82 10 0.

"W. HOWARTH.

"N. B.—On the deeds being signed at the offices in London previous to the 1st of November, the scrip-certificates will be given in exchange; after which period the deeds will be forwarded to the country, and must be there signed. Due notice of the time and place where the deeds will lie, will be given in the London and country journals.

"Upon the execution of the parliamentary contract and subscribers' agreement, scrip-certificates will be given in exchange for this certificate."

On the 4th of November, the plaintiff attended at the office of the company, and delivered up the bankers' receipt in exchange for scrip-certificates for sixty shares. The scrip was in the following form:—

"Provisionally registered.

"Direct London and Exeter Railway (with extension to Falmouth and Penzance.)

"Capital 3,000,000*l.*, in 120,000 shares of 25*l.* each.

"Offices, 6 Great Winchester St., Broad Street.

"No. —

"Scrip-certificate

— shares.

"No. — to — inclusive.

"This is to certify that the holder hereof is the proprietor of — shares of 25*l.* each in the above undertaking, on which a deposit of 1*l.* 7*s.* 6*d.* per share has been paid, subject to the fulfilment of the conditions of *the parliamentary contract and subscribers' agree-
*411] ment, which have been duly executed, in respect thereof.

(Date)

(Signed by two directors, one of whom was the defendant.)

"Ent^d. — Sec.

"N. B. A call of 1*l.* 5*s.* per share will be made when the bill has passed committee in the House of Commons, to pay the deposit required by the standing orders of the House of Lords."

At the time of exchanging the bankers' receipt for scrip, the plaintiff signed the subscribers' contract. By this deed,—which was made between the several subscribers to the undertaking, of the first part, and

two trustees, of the second part,—it was witnessed (amongst other things) “that each of them the said several persons parties thereto of the first part, had respectively subscribed the sum set opposite to the name of the same person in the schedule thereunto annexed, as the sum subscribed by the same person for the purpose of making and establishing a railway, &c., to be called by the name of ‘The Direct London and Exeter Railway,’ or by such other name as might at any time thereafter be adopted by the provisional committee or the directors engaged in promoting the said undertaking; and with full power for the said provisional committee or directors for the time being (amongst other things) to abandon and relinquish, or to abstain from making or completing, any portion or portions of the proposed line of railway and extension railway, and any branch or branches of railway connected with the same, or to abandon the extension railway, and the branches connected therewith, or any part thereof, and to enter into any agreement with any other company for the continuation thereof; and to make an application or applications to parliament for an act or acts for incorporating the subscribers to the said undertaking into a company *or companies, and to give to such company or companies power to make and establish [*412 such railway and extension railway, with such branch railways, &c., as might be determined on by the said provisional committee or directors as aforesaid, and to insert in such act, in addition to the usual and proper clauses and powers, all such special clauses and powers as the provisional committee or directors might think proper or desirable, with full power and authority to confine the application to parliament to the line of railway between London and Exeter, or any part thereof, or to any portion of the said intended extension railway, omitting the said extension or the remaining portion of the said lines respectively, and any branch therefrom respectively, as the case might be; and also with full power to the said provisional committee or directors, to permit any other company to hold shares in the said undertaking, or to enter into or make any other agreement, contract, or arrangement with any other company or companies, person or persons whatsoever, giving an interest in the said undertaking, and a control in the direction or management thereof, to such company or companies, person or persons, to such extent, on such terms, and subject to such stipulations and conditions as, the said provisional committee or directors might think fit; and, in the event of the provisional committee or directors determining not to apply to parliament for the extension railway from Exeter to Falmouth and Penzance, to enter into any arrangement with any other company who might make such application, and to agree with such company for the amalgamation, upon equal terms, of the two companies, and of the capital thereof, in the event of parliament sanctioning both the said lines of railway, and to insert in the said act or acts, and to consent to the insertion in any other bill or bills, all necessary powers and authorities for effecting the

*413] purposes *aforesaid*, in such manner as the directors or provisional committee might see fit." And the parties thereto of the first part did thereby "authorize and empower the said provisional committee or directors to *increase* the first or present capital of the company to such an amount as they might think proper for the purposes of the said undertaking, by allowing the present subscribers, or any of them, to increase the amount of their respective subscriptions, or by the admission of any new subscribers, or by both such means, and to *diminish* the said capital by decreasing the amount of each subscription therein." The deed then named certain persons, (of whom the defendant was one,) as a provisional committee, or directors, with power to add to their number, and proceeded as follows:—"And it is hereby declared that the majority of the votes of the provisional committee or directors for the time being present at any meeting (the number present not being less than five) shall have power to bind all present as well as absent directors, and also the general body of subscribers, &c. And the said provisional committee or directors shall have full power and authority to pay and discharge all such costs, charges, and expenses as may already have been, or shall hereafter be, incurred or disbursed in and about the forming or carrying forward the said undertaking; and to appoint, suspend, remove, and re-appoint the treasurers, bankers, solicitors, engineers, surveyors, secretaries, clerks, agents, servants, and workmen, and to pay and allow them all such costs, charges, expenses, salaries, and recompense for services or works already rendered or done, or hereafter to be rendered or done, as the said provisional committee or directors shall deem right, out of the funds hereby subscribed; and, generally, to do and perform all such acts as may seem expedient, in and towards the promotion of the said undertaking, and for obtaining an *act* or acts of parliament authorizing the same. And the said several persons parties hereto of the first part, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, do hereby undertake and agree, that, in the event of no such application as *aforesaid* being made to parliament, or of such application being made and the same not being successful, they the said persons parties hereto of the first part shall and will well and truly pay, allow, and discharge all the expenses which shall have been incurred, whether previously to or after the execution of these presents, in or about, or with a view to, the establishment or promotion of the said undertaking, whether in or about the making, obtaining, or completing of any surveys or estimates for the said railway and extension railway, or any branches or works connected therewith, or on account of any solicitors' charges, counsels' fees, the cost of preparing, applying for, soliciting, or promoting any such act or acts as *aforesaid*, travelling expenses, and all other costs and charges of every description incident or preparatory to the proposed undertaking,—all such expenses, costs, and charges to be computed and assessed rata-

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bly upon the amount of the sum or sums of money respectively subscribed by each of the said several persons parties of the first part to these presents," &c. And each of them the said parties thereto of the first part did thereby, for himself, and his heirs, &c., respectively, covenant with the trustees, their executors, and administrators, "that each of them the said parties thereto of the first part respectively, his or her executors or administrators, should and would well and truly pay, or cause to be paid, the amount subscribed by each of them respectively, or such part thereof as should not have been paid by them respectively at the date of their respective signatures to those presents, within four years from the *date thereof, in such sums, and at such places and times, as should be required by any act or acts of parlia- [*415
ment to be applied for as aforesaid, or as the directors or others to be authorized by the said act should lawfully direct or appoint, and, until the passing of such act or acts, as might be required by the directors or provisional committee, for the purpose of depositing the sum of money required, by the standing orders of either house of parliament, to be deposited in the Court of Chancery."

The plans, sections, and books of reference, through the default of the engineer of the company, were not deposited in the parliament office within the time prescribed by the standing orders, viz. the 30th of November, in a proper state; and consequently it became impracticable to go to parliament in that session. The funds realized by the deposits had been all expended except about 400*l.*, and the directors were not in a condition to make the necessary parliamentary deposit.

On the 15th of December, a meeting of the shareholders was held at the City of London Tavern, when the managing committee submitted the following report:—

"The committee of management of The Direct London and Exeter Railway, as now constituted, are anxious, at the earliest period, to present to the subscribers that full and fair statement of the affairs of the company which they promised in the advertisement issued by the board, dated the 22d of November last, and which they deem peculiarly necessary, from the present situation of affairs.

"It will be recollected that the project of The Direct Exeter Railway Company was, to afford an independent and integral communication from London to Exeter, in contemplation of an extension to Falmouth. That such *a proposition was most favorably received by the public, is evidenced by the single fact that nearly 400,000 ap- [*416
plications for shares were made to the company.

"Prospectuses were issued to raise a capital for this purpose, consisting of 120,000 shares of 25*l.* each, with a deposit of 1*l.* 7*s.* 6*d.* per share, an amount less than required by some companies, but the benefit of which was secured to the public in consequence of the registration

of the project previously to the alteration made in August last, in the standing orders of the House of Lords.

"In so gigantic an undertaking, especial caution was necessary in not prematurely encountering the charges of a detailed survey of the entire line. The committee were, however, encouraged by the favourable reception which the scheme met with from the public; and, bearing in mind that any further delay would render it impossible to prepare the undertaking for parliament in the ensuing session, and looking to the fact that an immense amount of shares had been applied for, they felt themselves justified in directing the engineers to proceed on the necessary surveys of the line, and in taking other measures requisite for the parliamentary deposit.

"No allotments were issued till the middle of October; at that time an allotment committee was constituted, *and they issued only 58,000 shares*. In stating this fact, the present committee cannot refrain from expressing their deep regret at a proceeding which has been fraught with considerable mischief to the interests of the company; for, it unfortunately happened, that, at the period when this small issue of allotments was made, a sudden depression was felt in the money market, which has affected indiscriminately the most promising and legitimate projects, as well as those of an opposite character. Such was the effect of this *panic, that, of the 58,000 shares allotted, 34,460 remain yet unpaid.

"The committee trust, that, in the performance of their duty to the shareholders in general, by collecting the deposits, those who have, in answer to their applications, received allotments of shares, and not yet paid thereon, the unpleasant necessity will not be imposed on them of compelling the fulfilment of the contract on the part of the applicants. The committee are prepared to allot the remaining shares, after their present statement shall have been given to the public, if they be encouraged to do so by the present meeting.

"The surveys, plans, books of reference, and other necessary documents have been completed and deposited; and, although in three instances, owing to unforeseen accidents, the deposits were not made until after 12 o'clock at night on the 30th of November, the directors are advised, and feel most confident, that, under the peculiar circumstances of the case, the deposits will be held by parliament as sufficient: and the committee are desirous to impress upon the shareholders, that, unless the scheme be wholly abandoned, their surveys and documents are available assets.

"The amount of labour required within a limited time for completing the surveys to Exeter, will be so manifest, that it will be evident the extension to Falmouth could not be attempted for the present, even if it was considered desirable to incur expense in so doing. The engineer reported most favourably of a peculiar line through Cornwall, which

was only postponed in consequence of the manifest impracticability of its being duly prepared in the coming session. It will, however, be borne in mind, that the extension is only postponed, not abandoned: on the contrary, the committee is advised that the line intended to be adopted at a later period, is superior to any other hitherto projected or *proposed, and one which they hope to be able to carry into execution hereafter. [*418

"The committee have further to refer with satisfaction to the deposits of the plans and sections for a branch line from Staines to Windsor, &c. &c.

"The directors having thought it due to the subscribers to put before them the facts relating to the proceedings, and the present position of the affairs of the company, and to assure the proprietors, that, from the most perfect investigation of the line, and from the reports of their engineer, they have unabated confidence in the intrinsic merits of the undertaking; and in spite of the casualty to which they have alluded, trust that a vigorous effort will be made to carry it forward, and to prevent the vast amount of labour and expense already bestowed upon it, from being entirely thrown away.

"Lastly, this committee are extremely desirous that it should be distinctly understood, that, whether the measure be carried on forthwith, or postponed till next session, no further expenses can or shall be incurred by those who have already paid their deposits."

Much angry discussion ensued on the reading of this report. The following resolutions were then proposed:

"That the shareholders have every confidence in the merits of the line, and determine to proceed in its support.

"That Sir B. Chichester, Bart., Dr. Phillimore, and Mr. Chambers be requested to form a committee of management, with power to add to their number.

"That the committee be authorized to issue shares to the extent required for the deposit in parliament; upon this condition, that, if the necessary amount be not subscribed for such deposits, the whole sum so raised be returned to the subscribers, without any deduction.

*"That, whatever steps can be taken without any expense beyond the money in hand, towards placing this project before parliament, be so taken. [*419

"That the committee prepare a statement of the accounts of the company, and that a copy thereof be given to every shareholder."

The plaintiff, who was present at this meeting, moved an amendment—"That, as 58,000 shares only had been allotted, the deposits received should be returned to the parties who paid them." The chairman, without noticing the amendment, put the original resolutions, which were carried by a large majority.

On the 31st of December, the committee of management found it im-

possible, in consequence of the engineer's default, to proceed with the bill; and, on the 6th of January following, the present action was commenced.

It was proved that the defendant had assented to the insertion of his name as a member of the committee of management: that he had attended one or two meetings; and that he had personally sanctioned the advertisement of the 17th of October, 1845, with the knowledge that 58,000 shares only had been allotted.

On the part of the plaintiff, it was insisted, that, inasmuch as the advertisement of the 17th of October, 1845, stating that the whole of the 120,000 shares had been allotted, when in fact the committee had allotted less than half that number, was a fraud upon the shareholders, he was entitled to recover back the deposit paid by him; that he was not estopped by his execution of the subscribers' contract, such execution having been influenced by the same false and fraudulent representation: and that, the scheme having become abortive, the plaintiff was entitled to recover back the deposit, as upon a failure of consideration.

*420] *On the part of the defendant, it was contended, that the plaintiff's application for shares, and the letter of allotment, together constituted a valid contract by which the plaintiff was bound to pay the deposit on the shares allotted to him, on or before the 18th of October, and therefore he could not be allowed to ascribe the payment made by him in pursuance of such contract, to the advertisement of the 17th of October; that there was no evidence that the plaintiff was in fact induced by the representation contained in that advertisement, to part with his money; and that, whatever might have been the result, had the case rested upon the prospectus and letters only, the plaintiff, by executing the subscription contract, expressly sanctioned the application of the deposits to the payment of the expenses incurred in preparing to go to parliament.

The learned judge, in summing up, told the jury, that,—the plaintiff having paid his money upon the faith of having shares allotted to him in a company whose capital was to consist of 3,000,000*l.*, in 120,000 shares of 25*l.* each,—if they were satisfied, that the defendant (that is, the committee of which he was a member) made, by means of the advertisement of the 17th of October, 1845, a representation that was false, and false to his own knowledge, and that that false representation was a material inducement to the plaintiff to pay the deposit, the plaintiff was entitled to recover it back; inasmuch as he was justified in assuming, from the language of that advertisement, that substantially the whole number of shares had been disposed of: and he further left it to the jury to say whether, at the time of the commencement of the action, the scheme had in their judgment become abortive.

The jury found both points in the affirmative,—expressly saying that the plaintiff “executed the deed on the 4th of November, under the

same belief as existed *in his mind when he paid the money on the 22d of October." [*421]

A verdict having been accordingly entered for the plaintiff, damages 82l. 10s.

Fitzherbert, in Michaelmas term last, pursuant to leave reserved at trial, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, or for a new trial on the ground of misdirection. He cited *Campbell v. Fleming*, 1 Ad. & E. 40, 3 N. & M. 834; *Moens v. Heyworth*, 10 M. & W. 147; *Brisbane v. Dacres*, 5 Taunt. 143; *Smith v. Mercer*, 6 Taunt. 76; *English v. Blundell*, 8 C. & P. 832, and *Edwards v. Bates*, 7 M. & G. 590, 8 Scott, N. R. 406.

Knowles and *J. Brown*, on a former day in this term, showed cause. The scheme in question was started early in the year 1845. In June, its promoters published a prospectus,—in which the name of the defendant, with his assent, appeared as one of the managing committee,—inviting subscribers to become partners in a concern that was to have a capital of 8,000,000l., divided into 120,000 shares of 25l. each, and stating, amongst other things, that the plans, sections, and books of reference would be ready within the time prescribed by the standing orders of parliament; that application would be made for a bill to incorporate the company, early in the next session; and that, in case parliament should not sanction the undertaking, the money deposited, deducting the necessary expenses attending the projection, would be returned to the shareholders. Upon the faith of the statements contained in this prospectus, the plaintiff, on the 18th of September, and the 10th of October, made application *for sixty shares; and, by a letter from the secretary, bearing date the 11th of October, that number of shares was allotted to him, the deposit upon which he duly paid to the bankers of the company on the 22d. On the 17th an advertisement had appeared in *The Times* newspaper,—which there was abundant evidence to prove that the plaintiff saw,—stating, in substance, that all the shares had been allotted. On the 4th of November, the plaintiff exchanged his letter of allotment for scrip, and signed the subscription contract. At a meeting of the subscribers, held on the 15th of December, the plaintiff for the first time discovers from the report then produced by the committee of management, that the statement in the advertisement of the 17th of October, that all the shares had been allotted, was false; the whole number allotted out of the 120,000, being 58,000 only. He also learned, that in consequence of the plans and sections not having been deposited in due time, and of the want of funds, the committee were not in a condition to apply to parliament during the session. Under these circumstances, he did all that an individual could do, to repudiate a contract into which he had thus been deluded, by proposing at the meeting that the deposits should be at once returned. The chairman, however, declined to put his amendment; and the plain-

tiff, finding the scheme had thus become abortive, on the 6th of January following, commenced the present action.

The plaintiff having paid the money under the influence of a false representation on the part of the committee, he is clearly entitled to recover it back as money had and received to his use. "The instant," as was observed by PARKE, B., during the argument in *Pope v. Wray*, *423] 4 M. & W. 458, "the money was paid, under a *misrepresentation of fact, the right of action accrued." It will probably be urged, as was contended at the trial, that the advertisement of the 17th of October was not intended to deceive shareholders or allottees, but was a mere apology addressed to disappointed applicants. Every man, however, must be taken to intend, and must be held responsible for, the natural consequences of his acts: *Polhill v. Walter*, 8 B. & Ad. 114. It will further be contended that the payment of the money is not to be referred to the misrepresentation, because the plaintiff was under a previous binding contract to pay the deposit. It is submitted, however, that there was no such binding contract. The plaintiff's letter of the 30th of September, asking for an allotment, is addressed to "The provisional committee of management of The Direct London and Exeter Railway Company." In it the plaintiff writes—"I request you will allot me thirty shares of 25*l.* each in the above railway;" meaning, a railway that shall have a capital of 8,000,000*l.*, in 120,000 shares of 25*l.* each; and the letter proceeds—"and I undertake to accept *the same*, or such less number as you may appropriate to me, subject to the regulations of the company; also to sign the necessary legal documents, and to pay when required the deposit thereon of 1*l.* 7*s.* 6*d.* per share." The answer to this letter, which bears date the 11th of October, though the precise period of its delivery was not proved, is not a distinct and unqualified acceptance of the plaintiff's proposal: it intimates to him that the required number of shares are allotted to him subject to certain conditions not warranted by the prospectus. In the first place, the letter of allotment is declared "not transferable." This restriction was unjustifiable; for the 26th section of the joint-stock registration act, 7 & 8 Vict. c. 110, which prohibits the sale of shares, before *complete* *424] registration, in any joint-stock company formed *after the 1st of November, 1844, does not apply to railway companies requiring an act of parliament: *Young v. Smith*, 15 M. & W. 121; *Lowton v. Hickman*, 10 Jurist, 548. These letters are equivalent to, and are ordinarily bought and sold as "shares," in the stock-market: *Mitchell v. Newhall*, 15 M. & W. 308. No statute or rule of law exists to prevent their sale: *Hibblewhite v. M. Morine*, 5 M. & W. 462; (a) *Mortimer v. M. Callan*, 6 M. & W. 58. In the next place, a condition is introduced, that the deposit shall be paid on or before a given day, or the allotment will be forfeited, and the shares disposed of to other appli-

(a) Overruling *Bryon v. Lewis*, R. & M. 386.

cants. Where a contract is to be collected from a correspondence between the parties, "the letters will not constitute an agreement, unless the answer to the offer is a simple acceptance, without the introduction of any new term." (a) It was perfectly competent, therefore, to the plaintiff, when he received the letter of allotment, to decline to take the shares upon the terms indicated. It is a fallacy to say that the subsequent payment of the deposit was a payment made pursuant to a binding contract: it was, as the jury have found, made upon the faith of the false representation that the full number of shares had been allotted. Would an action have lain against the plaintiff, at the suit of the company, under the circumstances here proved? Would it not have been a good answer for the plaintiff to say that he did not contract to become a partner in a concern with the more limited amount of capital, and the smaller number of shareholders? *Fox v. Clifton*, 6 Bingh. 776, 4 M. & P. 676, is directly in point. There, a prospectus was issued for a *distillery com- [*425
pany with a capital of 600,000*l.*, in 12,000 shares, to be conducted pursuant to the terms of a deed to be drawn up: all persons who neglected to execute the deed within thirty days after it was ready, were to forfeit all interest in the concern: no more than 7500 shares were ever allotted: only 2800 persons paid the first deposit, only 1106 the second, and only sixty-five signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern; it was held, that an application for shares, and payment of the first deposit, did not constitute a partner, one who had not otherwise interfered in the concern. "The advertisement," said TINDAL, C. J., in delivering the judgment of the court, "is the basis of the contract between the parties: it is upon the footing of this prospectus that the seven defendants had their shares allotted to them, and paid their deposits: if they are not partners under this agreement, they are not partners under any; for, they neither exchanged their scrip-receipts for certificates of shares, nor executed the deed when prepared, nor paid a second call when made, nor appeared at any meeting, nor interfered with any concerns of the company, nor did any act subsequent to the making this contract, nor any act before, other than applying for shares and paying the deposit of 5*l.* per share, when they learned, from the letter of the secretary, that a certain number of shares was appropriated to them. The paying of the deposits must, undoubtedly, be taken to imply an assent to the terms of the advertisement; that is, an assent to become partners in a company raising a capital of 600,000*l.*, consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future: but we think it

(a) 1 *Sagden's Vendors and Purchasers*, 10th edit. p. 165; citing *Holland v. Eyre*, 2 Sim. & Sta. 194; *Roadledge v. Grant*, 4 Bingh. 653, 1 M. & P. 717; and *Smith v. Surman*, 9 B. & C. 561.

implies nothing more, and that it cannot be construed as an assent to the terms of a *partnership already formed. When, therefore, *426] instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7500; when, out of that number, no more than 2300 ever paid the first instalment; when not half the latter number paid the second instalment, and only sixty-five subscribers signed the deed; we think the subscribers were at liberty to say—this was not the trading company upon which we paid our deposit, neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest in the concern upon their refusal to execute the deed; which loss they appear to have submitted to.” That case distinctly recognises the right of an allottee to repudiate where the undertaking turns out to be different from that represented. *Pitchford v. Davis*, 5 M. & W. 2, is yet more precisely in point. There, a project having been formed for the establishment of a company for the manufacture of sugar from beet-root, a prospectus was issued, stating the proposed capital to consist of 250,000*l.*, in 10,000 shares of 25*l.* each. The directors began their works, entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1400 out of the 10,000 shares were taken. It was held, that a subscriber who had taken shares, and paid a deposit on them, was not liable upon such contracts of the directors, without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorized the making of the contracts. Lord ABINGER, C. B., said: *427] “I thought at the trial, and am still of the *same opinion, that, where a prospectus is issued, and shares created, for a speculation to be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance unless the terms of the prospectus in that respect are fulfilled. But, if it be shown that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts.” And PARKER, B., said: “The defendant, by taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the proposed capital obtained.” If it be said that no time is limited for the performance of the condition precedent of allotting the full number of shares, the answer is, that, in the absence of an express limitation, the law will imply a reasonable time. [WILDER, C. J. In ascertaining which, regard must be had to the general interests of the concern.] In all cases where a payment has been induced by a fraudulent representation, the money may be recovered back. Thus, in *Flight v. Booth*, 1 N. C. 370,

1 Scott, 190, where there was a material and substantial misdescription of the property in particulars of sale, it was held that the purchaser had a right to rescind the contract, and recover back the deposit. *Campbell v. Fleming*, 1 Ad. & E. 40, 8 N. & M. 834, which was cited on moving for the rule, does not affect the present question: the plaintiff there had continued to deal with the shares after he became acquainted with the fraud that had been practised upon him. [WILDE, C. J. The application of that case to the present depends upon the effect of the plaintiff's conduct at the meeting of the 15th of December.] Nothing that the plaintiff did upon that *occasion* can be construed into a waiver of his right to repudiate the contract. *Edwards v. Bates*, 7 M. & G. 590, 8 Scott, N. R. 406, was also cited on the motion, for the purpose of showing that the plaintiff's remedy, if any, was upon the deed. CRESSWELL, J., in the course of the argument in that case, puts exactly the case now under consideration. He says,—alluding to an observation made by BAYLEY, J., in *Tilson v. The Warwick Gas-Light Company*, 4 B. & C. 962, 7 D. & R. 376, upon the case of *Atty v. Parish*, 1 N. R. 104,—“The only effect of that seems to be, that, where the defendant has received money under circumstances that would make it money had and received to the plaintiff's use, the execution of a subsequent deed of covenant between the parties would not prevent the plaintiff suing in assumpsit or debt for money had and received.” That case suggests another question, viz. whether it is competent to the defendant, under non assumpsit, to rely on the deed. (a) Discarding the advertisement, the case still discloses a gross fraud on the part of the company, in taking the plaintiff's deposit after they had by their own voluntary act reduced the amount of capital and the number of shares to less than half that which the prospectus represented. *Nockels v. Crosby*, 3 B. & C. 814, 5 D. & R. 751, and *Walstab v. Spottiswoode*, 15 M. & W. 501, show, that, where money is paid for subscriptions to a scheme that becomes abortive, the subscribers are entitled to recover back the whole sums paid by them, without any deduction on account of preliminary expenses.

The execution of the deed by the plaintiff makes no difference. It was a part of the fraud complained of. And the jury have found that its execution was induced *by the same fraudulent representation that induced the plaintiff to pay the deposit. (b)

(a) See the dictum of Maule, J., in *Filmer v. Burnby*, 2 M. & G. 529, 2 Scott, N. R. 689.

(b) See *Garwood v. Ede*, 1 Exch. 264, *Clements v. Todd*, 1 Exch. 268.

In the former, an allottee of shares in a railway company provisionally registered, paid a deposit of 2l. 12s. 6d. per share, and signed the subscribers' agreement, which gave the provisional directors power to carry on the undertaking or any part of it, or to abandon the whole or any part of it, and, out of the moneys which should come to their hands by way of deposit or otherwise, to make such deposits or investments as might be required by the standing orders of parliament, and also to pay salaries, &c., and also the costs of obtaining acts of parliament, &c., and generally to apply such moneys in paying and satisfying all other costs, expenses, or liabilities which they might incur in relation to the undertaking. The scheme proved abortive, and the company was dissolved under the provisions of the 9 & 10

Sir *F. Kelly*, *Channell*, Serjt., and *Fitzherbert*, in support of the rule. The plaintiff entered into a contract with the provisional committee of management of the company in question, under and by virtue of which he became legally bound to pay, and did pay, certain moneys by way of deposit. He afterwards, by virtue of the same contract, executed a certain deed, by which he entered into new obligations. Upon this *480] state of *things, the company is clearly entitled to retain the money so paid, for the purpose of carrying the projected undertaking into effect, or until it is finally abandoned. At all events, the plaintiff cannot be entitled to recover back the whole amount paid, but only so much as may remain unappropriated to the discharge of the expenses provided for by the original contract, and by the deed; and, as no evidence was given that any such surplus in fact remained, the defendant was entitled to a verdict,—or to a new trial, on the ground that the question was not properly left to the jury, and that their verdict was found upon an issue that did not properly arise in the cause. [CRESSWELL, J. What question do you suggest should have been left to the jury?] Not, whether there had been a suppression of a material fact, as in a case of insurance; but whether the defendant knowingly made a false and fraudulent representation, and whether the plaintiff paid his money in consequence of that representation. [CRESSWELL, J. As I read the summing up, the question *was* so put.] It was rather put hypothetically, whether the jury would infer from the evidence that the plaintiff *might have been* induced to part with his money upon the faith of the assumed false representation contained in the advertisement of the 17th of October, than as a fact that he *was* induced by that representation to pay the money.

That this payment was made in pursuance of the contract evidenced by the application for shares and the letter of allotment, is clear. And it is no answer to say that there has been a subsequent collateral misstatement. In *Moens v. Heyworth*, 10 M. & W. 147, it was expressly held,^(a) that a collateral statement made at the time of entering into a *481] contract, but not embodied in it, must, in order to invalidate the contract, on the ground of its *being a fraudulent statement, be

Viol. c. 28. In an action to recover back the deposit,—it was held that the plaintiff, by executing the deeds, had authorized the directors to dispose of the money, and therefore could not recover back any part of the deposit.

And in the latter, the plaintiff signed an application for shares in a railway company provisionally registered. The application contained the usual undertaking to sign the subscribers' agreement, and parliamentary contract when required. The plaintiff had no letter of allotment, but, having paid the deposit, received scrip-certificates in the usual form, stating that "the subscribers' agreement and parliamentary contract had been signed by the person to whom the certificate was issued." The plaintiff, in fact, never signed either the subscribers' agreement or parliamentary contract. The scheme having proved abortive,—in an action to recover back the deposit, it was held that the plaintiff had placed himself in the same situation as if he had signed the subscribers' agreement and parliamentary contract, and could not recover.

(e) Par Parke, B. and Alderson, B.; Lord Abinger, C. B. *dissentiente*.

shown not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract. *Stone v. Grubham*, 2 Bulstr. 225, 226, (a) *Powell v. Edmunds*, 12 East, 6, and *Mason v. Ditchburn*, 2 C. M. & R. 720, n., are to the same effect. Here, nothing had occurred down to the time of the payment of the deposit, that could have the effect of releasing the plaintiff from the performance of his contract. The contract is clearly defined. The prospectus states, that, "in case parliament should not sanction the undertaking, the money deposited, deducting the necessary expenses attending the projection, will be returned to the shareholders." That was a distinct notice that the deposit was not in any event to be returned undiminished; but that some portion of it, at least, was to be applied in discharge of necessary expenses. The cases of *Fox v. Clifton*, *Pitchford v. Davis*, *Nockels v. Crosby*, and *Walstab v. Spottiswoode*, are totally inapplicable. In the first two, no question arose as between the shareholder and the company; it was sought to charge the respective defendants with contracts entered into by the directors with third parties, on the ground that they were partners in the adventure: and, in the last two, the committee had no power to apply any of the deposits to the payment of preliminary expenses, but were bound to hold them down to the time of giving out scrip; they were, therefore, simply cases of payment of money upon a consideration that had failed or been destroyed. Here, however, there is no room for implication or inference; the money is paid under an express contract. By his letter of application, the plaintiff undertakes to accept such shares as may be appropriated to him, subject to the regulations of the company, to sign the necessary *legal documents, and to pay the deposit when required. The letter of allotment sent to the plaintiff, in answer to his application, informs him that the committee have allotted to him certain shares, "upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon, be paid on or before Saturday, the 18th of October;" and he is further informed, that, in default of payment, "this allotment will be forfeited, and the shares disposed of to other applicants." It may be conceded, that, where a contract is made by letter, and a new term is introduced, in the answer, not contemplated, or included in the proposal, the contract does not become complete until the new term is assented to. Thus, a proposal to take a lease for a certain term, (as in *Holland v. Eyre*,) or from a given period, (as in *Routledge v. Grant*,) coupled with an answer agreeing to grant a lease for a different term, or to commence from a different period, will not, without more, constitute a contract. What is the new term introduced here? The fixing the day for the payment of the deposit is in express accordance with the plaintiffs' proposal. Then, it is said that the letter of allotment superadds a condition, that, in default of payment of the deposit on the day named, the allotment will be forfeited, and the shares disposed of to

(a) *Quare* the relevancy of this case.

other applicants, and that the shares shall not be transferable. There is nothing in this that is inconsistent with the proposal. The plaintiff undertakes to accept such shares as may be appropriated to him, *subject to the regulations of the company*. [WILDER, C. J. Subject to the regulations referred to in the prospectus. What is the use of a prospectus, if it be not to inform the public of the conditions and regulations upon which the company proposes to contract with them?] That is not the fair and legitimate meaning of the letter: it means, subject to such reasonable regulations as the company may from time to time find it convenient to make in relation to

*433] the allotment of shares,—one of which must necessarily be the time at which the deposit is to be paid, and another the mode of enforcing the observance of that essential preliminary. There can be no reason why a different construction should be put upon this contract than is put upon the ordinary clause of forfeiture in a lease. The lessee cannot avoid the lease by non-payment of rent on the day; but the lessor may avail himself of the forfeiture, or waive it, at his option. Besides, the very term “forfeiture” presupposes the possession or the right to the thing forfeited. It was a part of the plaintiff’s contract, that he would sign the parliamentary contract, upon exchanging his bankers’ receipt for scrip. Accordingly, on the 4th of November, he executes the deed, and takes the scrip. By the deed, he contracts with the trustees, amongst other things, that the provisional committee or directors therein named, “shall have full power and authority to pay and discharge all such costs, charges, and expenses as may already have been, or shall hereafter be, incurred or disbursed in and about the forming or carrying forward the said undertaking;” and, further, “that, in the event of no such application as aforesaid being made to parliament, or of such application being made and the same not being successful, they the said parties thereto of the first part (the subscribers or allottees) shall and will well and truly pay, allow, and discharge all the expenses which shall have been incurred, whether previously to or after the execution of these presents, in or about, or with a view to, the establishment or promotion of the said undertaking.”

[WILDER, C. J. The deed undoubtedly confers upon the committee very extensive powers. But the jury have expressly found that the plaintiff executed that deed on the 4th of November, under the same belief as existed in his mind when he paid the deposit on the 22d of October.]

*434] The money was paid under and subject to the terms of a contract, by which the plaintiff agreed, that, in the event of the scheme becoming abortive, it should be available for the discharge of the necessary preliminary expenses. The money is subscribed under a contract which expressly contemplates the possible failure of the undertaking. It must be matter of doubt whether the legislature will entertain the application for an act to incorporate the company, and also whether the scheme will receive such an amount of encouragement from

the public as will enable the committee to go to parliament. Much preliminary expense must necessarily be incurred before these doubts can be solved. It is not contended that the plaintiff's execution of the deed in any way prejudices his right of action, if he be entitled to avoid the original contract on the ground of fraud.

Assuming, as is contended on the part of the plaintiff, that the contract was open, what is the effect of the advertisement of the 17th of October? [WILDE, C. J. It states that the committee have appropriated shares up to the extent of their power to appropriate.] It may be that the unappropriated shares were reserved by the committee for a very proper and beneficial purpose. By the terms of the subscription contract, they had power to agree for the amalgamation of this company with any other railway company; (a) and this could only be effected by retaining a considerable number of shares at their disposal. [CRESSWELL, J. What is it the company contracts to give the plaintiff in exchange for his deposit? Sixty 120,000th parts of 3,000,000*l.* They offer him sixty 58,000th parts of 1,450,000*l.*,—a sum that must render the scheme abortive. WILDE, C. J. The prospectus states that the deposit of 1*l.* 7*s.* 6*d.* per share will be sufficient to comply with the standing orders of *the House of Commons. That would not be so, unless the whole 120,000 shares were allotted and paid [*485 for.] It never can be contended that it is a condition precedent that the whole number of contemplated shares shall be applied for and allotted before any liability can arise on the part of the allottees. [WILDE, C. J. Could the committee have sustained an action against the present plaintiff, upon proof that 58,000 shares only had been appropriated, although *bond fide* applications from responsible persons had been made to a number exceeding 400,000?] The point is now under the consideration of the Court of Queen's Bench, in a case of *Woolmer v. Toby*. There, however, the disparity was not so great—the proposed number of shares being 40,000, and the number allotted 36,400; and there was no clause of forfeiture, as here. *Taylor v. Ashton*, 11 M. & W. 401, and the cases there cited, show, that, in order to have the effect here contended for, actual fraud should have been intended.

Assuming that the plaintiff became aware for the first time at the meeting of the 15th of December, that the full number of 120,000 shares had not been allotted, and that he was therefore entitled to rescind the contract, he was bound to take his stand at once, if he meant to rely upon the objection, and to retire: *Richardson v. Dunn*, 2 Q. B. 218. He had no right to say, that, by reason of the fraud, he had never become a shareholder, and at one and the same time to claim the privileges of a shareholder, by opposing the resolutions that were put, and proposing an amendment.

Manifest injustice will be done, unless this question be submitted to

(a) So far as the extension line and branches were concerned.

another jury in less ambiguous and more correct terms. By the mode in which the question was left to them, the jury were evidently led to suppose that the plaintiff must necessarily be entitled to recover *436] *back the deposit, if there were any misrepresentation; whereas, the true question was, whether he really was induced to pay the money by the statement contained in the advertisement of the 17th of October. To entitle the plaintiff to recover, it was not enough that the representation was false, and false to the defendant's knowledge; it was necessary also that the plaintiff was thereby induced to enter into the contract. [WILDE, C. J. What I understand my brother ERLE to have said, was, that, to entitle the plaintiff to recover, the false representation need not have been the *sole* inducement to his paying the money, but that it must have had a material influence on his mind.]

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

This was an action of assumpsit for money had and received to the use of the plaintiff: to which the defendant pleaded non assumpsit.

The action was brought by the plaintiff against the defendant as one of the committee of management of a projected railway company, to recover the sum of 82*l.* 10*s.* paid by the plaintiff as a deposit on sixty shares which had been allotted to him in that concern.

The cause was tried before ERLE, J., at the sittings at Guildhall after last Trinity term, when it appeared in evidence, that, in the month of June, 1845, a prospectus was issued in the following form:—"Direct London and Exeter Railway Company, with extension to Falmouth and Penzance. Capital 8,000,000*l.*, in 120,000 shares of 25*l.* each. Deposit 1*l.* 7*s.* 6*d.* per share. A further deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons. With power to raise 1,000,000*l.* more, if necessary. Provisionally registered pursuant *437] to 7 & 8 Vict. c. 110." It then *proceeds to give the names of the provisional committee, the committee of management, (amongst whom was the defendant,) and the several officers of the proposed company; and states, amongst other things, that "the plans, sections, and books of reference will be ready within the time prescribed by the standing orders of parliament; and application will be made for a bill to incorporate the company early in the next session. The usual power will be taken by the act to allow interest at 4*l.* per cent. per annum, after passing the act, on the amount of the subscriptions paid up, and that no subscriber shall be answerable for more than the amount of his deposit, until the act be obtained, and then not beyond the amount of his subscription. In case parliament should not sanction the present undertaking,—which every active means will be taken to secure,—the money deposited (deducting the necessary expenses attending the projection) will be returned to the shareholders. * * * The deposit of 1*l.* 7*s.* 6*d.* per share will be sufficient to comply with the standing order

of the House of Commons; and, after the bill has passed the Commons, a further deposit of 1*l.* 5*s.* will be made, in order to comply with the regulations of the House of Lords." At the foot of this document, a printed form of application for shares was given.

On the 25th of September, 1845, the plaintiff sent in an application for thirty shares, in the form prescribed. And, on the 10th of October, he caused application to be made to one of the directors to obtain an allotment of sixty shares in lieu of thirty. In answer to his application, the plaintiff, some time between the 11th and the 22d of October, received from the secretary a letter of allotment, (*ut ante*, p. 408.) In this letter, as well as in the prospectus, the concern is described as one which was to have a capital of 3,000,000*l.*, in 120,000 shares.

*Before the day appointed for the payment of deposits, an advertisement was published by the managing committee, as follows :— [438

"Direct London and Exeter Railway Company, with extension to Falmouth and Penzance.

"The committee of management hereby give notice that *they have completed the allotment of shares*, and that the usual letters are this day issued. In the arduous duty of deciding on claims unprecedented, it is believed, in their number and respectability, the committee have been obliged to give a preference to applicants locally interested, or likely to bring to bear for the company a large share of legitimate influence. The numerous persons of undoubted claims, on the score of wealth and social standing, whose applications have either been passed over or cut down, are requested to accept this reason as the company's apology. The committee desire to add, that, while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations under Mr. Braithwaite are so far advanced that the project cannot fail to be placed before parliament in a manner the most satisfactory to the shareholders."

Some evidence was given from which it might be inferred that the plaintiff saw this advertisement: and on the 23d of October, he paid 82*l.* 10*s.* as a deposit on the shares allotted to him. At that time, the committee had in fact allotted no more than 58,000 shares, although applications had been made by responsible persons for more than the 120,000.

On the 4th of November, the plaintiff executed the subscription contract, under seal; which gave power to the committee to pay expenses which then had been or might thereafter be incurred, out of the funds thereby described.

The plans and sections deposited in the parliament *office on the 30th of November were imperfect; the whole of the deposit, except 400*l.* had then been expended; and the committee had no funds [439

for making the deposit required by the standing orders of the House of Commons.

On the 15th of December, a meeting of shareholders was called, at which the plaintiff attended. Resolutions of confidence in the concern and in the committee of management, and that a further allotment of shares should be made to raise the sum required for deposit, were proposed. The plaintiff moved an amendment, "that, as 58,000 shares only had been allotted, the deposits already received should be returned to the parties who paid them." The chairman did not put the amendment; but he did put the original resolutions, which were carried by a large majority.

A few days afterwards, the committee found that it was impossible to proceed with the undertaking; and, on the 6th of January, 1846, this action was commenced.

Upon this state of facts, it was insisted on the part of the plaintiff, that the advertisement stating that the allotment of shares had been completed, was false to the knowledge of the committee, and was a fraudulent misrepresentation; and that the plaintiff, having been thereby induced to pay his money, was entitled to recover it in this action; and that the deed was executed by the plaintiff under the influence of the same misrepresentation, and therefore did not affect his rights.

For the defendant, it was insisted that the written application for shares, and the letter of allotment, constituted a valid contract, by which the plaintiff was bound to pay the deposit on or before the 18th of October, and therefore he could not be permitted to ascribe the payment which he made to the advertisement: and, further, that, whatever might
*440] have been the result, had the case rested on the prospectus and letters only, the deed expressly authorized the application of the deposits to the payment of the expenses incurred in preparing for parliament.

The learned judge before whom the cause was tried, without declaring his opinion whether the letters of application and allotment constituted a binding contract or not, left it to the jury to say—whether the defendant made a fraudulent misrepresentation which was a material inducement to the plaintiff to pay his money,—whether the consideration had failed, the company being at an end,—and whether the deed was executed by the plaintiff under the same belief which had operated on his mind when he paid his money.

The jury having answered these questions in the affirmative, the learned judge said that their finding entitled the plaintiff to a verdict for 82*l.* 10*s.*; for which amount a verdict was accordingly entered for him.

In Michaelmas term last, a rule nisi was obtained for entering a nonsuit, or a verdict for the defendant, or for a new trial on the ground of misdirection. The case was recently argued before us, when it was

contended (as at the trial,) on behalf of the defendant, that the letters constituted a binding contract, and that the payment made by the plaintiff must be ascribed to his legal liability, and not to the advertisement; that the advertisement contained no misrepresentation, for it did not import that the whole number of shares had been allotted,—or, if it did, the representation was manifestly addressed to disappointed applicants, and not to allottees, and therefore it was not a misrepresentation to the plaintiff; and that, if the money was not obtained by fraud, the deed which the plaintiff executed, expressly authorized the application of it to the payment of expenses incurred. But it was admitted, that, if the payment was obtained by fraud, the deed would be no *answer to the action. It was further contended that the plain- [*441
tiff, by attending the meeting of the 15th of December, and there acting and voting as a shareholder after he heard that only 58,000 shares had been allotted, had precluded himself from claiming a return of his deposit on that ground,—for which *Campbell v. Fleming*, 1 Ad. & E. 40, 3 N. & M. 834, was cited as an authority.

Upon the first of these points, we are of opinion that there was no contract binding the plaintiff to part with his money, at the time when he paid the deposit. He had applied for sixty shares in a concern which was to have a capital of 3,000,000*l.*, raised by the issue of 120,000 shares. The committee allotted to him a very different thing, but professed to allot to him that which he had asked for: and the letter of allotment, as well as the prospectus, describes the capital as 3,000,000*l.*, and the number of shares as 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of 3,000,000*l.*, but perfectly absurd to suppose it could be accomplished for less than half that sum. The plaintiff, therefore, having asked for shares in a practicable scheme, received shares in a scheme that was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000 shares, although more than the whole 120,000 had been applied for by responsible parties. That which was allotted not being in truth that which the plaintiff had asked for, he was not bound to take it. Again, the allotment was not absolute, but conditional only; and on that ground also we think that the application and allotment did not constitute a valid contract; the latter not being a simple acceptance of the plaintiff's proposal.

Such being our opinion as to the alleged contract, we must inquire whether there was any evidence that the *plaintiff was induced to pay his money, by any fraudulent misrepresentation. If [*442
there was no fraudulent misrepresentation, the plaintiff ought to have been nonsuited, or a verdict should have been found for the defendant. But we think there was ample evidence of such misrepresentation. If we are to construe the advertisement, we think it means that all the shares had been allotted; and, as it was a public advertisement, at least

it must be taken to have been addressed to all who were interested in the subject-matter of it,—of whom the plaintiff was undoubtedly one. To him it represented that he had got what he asked for, viz. sixty of 120,000 shares in the proposed adventure. The jury, therefore, were well warranted in finding that the representation so made, was a material inducement to him to pay his money. If the meaning of the advertisement was for the jury, they appear to have construed it as we do. Either way, there was ample evidence to be left to the jury on this point; and there is no ground for either a nonsuit or a verdict for the defendant.

The next point made for the defendant, was, that the plaintiff, by attending and acting as a shareholder at the meeting of the 15th of December, when he knew that only 58,000 shares had been allotted, had precluded himself from making any claim to his deposit on that ground. But the evidence disposes of this point. The only act done by the plaintiff at that meeting, was, to propose, that, in consequence of the allotment of 58,000 shares only, all the deposits should be returned: and the argument comes to this, that, having tried to get others to join him in claiming the deposits, and having failed in that attempt, he shall not be permitted to do so by himself. No such doctrine as that is to be found in *Campbell v. Fleming*, or in any other decided case that we are aware of. The plaintiff did no act at that meeting, or afterwards, showing his assent to be treated *as a holder of the sixty shares; and
 *448] we think, that notwithstanding his attendance at that meeting, he is in a condition to maintain this action. The motion, therefore, for a nonsuit, or a verdict for the defendant, entirely fails.

But it was further contended by Mr. *Fitzherbert*, that the defendant was entitled to a new trial, because the learned judge did not tell the jury whether the letters of application and allotment did or did not constitute a binding contract. It is impossible to make that a ground for granting a new trial. Whether they constituted a contract or not, was a question of law for the court, not of fact for the jury: and, if a new trial were granted, the same question that the learned judge submitted to the jury, must be again submitted to them. Moreover, it appears, that, after taking their opinion on the question of fraudulent misrepresentation, the judge said that the plaintiff was entitled to a verdict, which must be taken as a direction to the jury to find such verdict. If, in order to give that direction, it was necessary to decide that the letters *did not* constitute a contract, the learned judge, in giving that direction, must be taken to have so decided. And, if we had considered that the letters *did* constitute a contract, we must have treated that direction as incorrect, and have made the rule absolute for a new trial. Inasmuch as we think the direction right, the rule obtained by the defendant fails, as to this, as well as the other points, and must be discharged generally.

My brother WILLIAMS, having been consulted on this case, when at the bar, has taken no part in the decision. Rule discharged.(a)

(a) And see *Jarrett v. Kennedy*, post, Vol. V.

*NIAS v. DAVIS. May 8.

[*444

A, a prisoner in execution in the common jail, for the county of Radnor,—but having a permanent lodging in London, where his wife and family resided, and to which it was his intention to return,—petitioned the court of bankruptcy for protection from process, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and a commissioner of that court issued his warrant to bring A. before him for examination. The prisoner was accordingly brought up to London on Saturday, the 24th of January, and carried before the commissioner at about two o'clock on that day, when his petition was dismissed, for informality.—*Held*, that A. had a sufficient residence within the London district to entitle him to present his petition there, and that the commissioner had such jurisdiction in the matter as to justify the sheriff in yielding obedience to his warrant.

Before five o'clock on the Saturday afternoon, a writ of *habeas corpus* was lodged with the town agent of the sheriff, and a copy served upon the officer who had A. in custody. The writ was sent into Radnorshire that evening, and returned on the following Monday, when A. was taken before a judge at chambers, and committed to the Queen's prison. It appeared that A.'s state of health was such that he could not, without inconvenience and risk, have been carried back to Radnorshire on the Saturday night; and that, in the interval between the dismissal of his petition and his being taken before the judge, the officer who had him in charge, allowed him to go to taverns, and other places, in London and Middlesex, but always in actual custody:—*Held*, that the sheriff was not guilty of an escape; for, that he was only bound to take his prisoner back to jail within a convenient time, and to guard him with a reasonable degree of strictness during the time he was necessarily out of the limits of his county.

THIS was an action upon the case against the sheriff of the county of Radnor, for suffering one Carroll, a prisoner in his custody under a writ of *capias ad satisfaciendum*, to escape and go at large. The defendant pleaded not guilty, and also (amongst others) a plea denying the caption.

The cause was tried before ERLE, J., at the sittings in London after last Easter term. The facts that appeared in evidence were as follows:—On the 30th of January, 1846, a writ of *capias ad satisfaciendum* against Carroll, at the suit of the present plaintiff, was delivered, in London, to the town agent of the undersheriff of Radnorshire, and by him sent to the undersheriff, enclosed in a letter stating that Carroll was in Presteigne jail, to which *he had been committed on the 10th or 12th of November, 1845, in execution at the suit of one [*445 Steele.

On Saturday, the 24th day of January, Carroll was brought up to London, by an officer of the sheriff of Radnorshire, in obedience to a warrant issued by a commissioner of the court of bankruptcy, for his examination upon a petition presented by him to that court for protection from process. He was taken before the commissioner about two o'clock on that day, when the commissioner, upon the hearing, dismissed his petition, for informality. On the same day, a writ of *habeas corpus* was issued, and lodged with the town agent of the sheriff before five o'clock, and by him sent down into Radnorshire,—a copy being served in Lon-

don upon the bailiff who had Carroll in his custody. Carroll's health, it appeared, was such that he could not have been carried back to Presteigne on the 24th without much inconvenience and some risk. The sheriff's return to the *habeas corpus* arriving in London on the 26th, Carroll was on that day taken before a judge at chambers, by whom he was committed to the Queen's prison.

On the 24th, Carroll went to The Rainbow tavern, and to Anderton's Coffee House, in Fleet Street, and also to the office of his attorney in Lincoln's Inn, and to the chambers of a gentleman in Gray's Inn. He slept that night at the west end of the town, and spent the following day (Sunday) at an inn at Hampstead, called The Spaniards, returning at night to sleep in town. The officer who had him in charge, was, during all this time, until his commitment to the Queen's prison, in constant attendance upon him, and slept in the same room with him on the Saturday and Sunday nights.

In his petition, which bore date the 17th of January, 1846, Carroll
 *446] stated several successive places of his *residence, in Middlesex, Surrey, and London; and, amongst them, one in London, in which his wife and family remained at the time of the presentment of the petition, and of the trial, and where he had resided for twelve months successively when arrested at the suit of Steele. He also described himself as "now a prisoner in Presteigne jail."

On the part of the plaintiff, it was insisted, that, inasmuch as Carroll was not personally resident within the London district at the date of his petition, the commissioner had no jurisdiction to issue his warrant to bring him up to London for examination, and consequently, that, in bringing him up in obedience to that warrant, the sheriff was guilty of an escape; and, further, that, assuming that the sheriff was justified in yielding obedience to the commissioner's warrant, the conduct of the officer, in permitting Carroll to go about in the manner he did whilst in London,—even if he was justified in abstaining from returning with him to Presteigne on the Saturday afternoon,—made the sheriff liable for an escape.

The learned judge ruled that there was sufficient evidence of a caption to entitle the plaintiff to a verdict on the second issue; that the officer was not, under the circumstances, bound to carry his prisoner back to Presteigne on the Saturday, or to travel on the Sunday; and that, Carroll being absent from the place of residence of his family, by compulsion of law, but with an intention to return to it, he had such a residence within the London district as to entitle him to present his petition to the court of bankruptcy there, and, consequently, that the warrant was a sufficient protection to the sheriff. He accordingly directed a verdict to be entered for the defendant on all the issues but the second;
 *447] reserving to the plaintiff leave to move to *enter a verdict for nominal damages, if the court should be of opinion that either objection was tenable.

Channell, Serjt., on a former day in this term, obtained a rule nisi. He referred to the statutes 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, ss. 1, 7; and to *Boyton's case*, 8 Co. Rep. 43; *Brown v. Crompton*, 8 T. R. 424; and Rolle's Abridgment, tit. *Escape*, D. 2.(a) And TINDAL, C. J., mentioned *Thomas v. Hudson*, 14 M. & W. 353, 2 D. & L. 883,(b) as an authority to show that the sheriff was bound to obey the warrant of the commissioner.

June 9, 1846. *Dowling*, Serjt., (with whom was *E. V. Williams*), showed cause. The commissioner having jurisdiction by virtue of the 1 & 2 W. 4, c. 56, 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96, the sheriff, by his officer, was bound to yield obedience to his warrant. The original jurisdiction of the court of bankruptcy is created by the 1 & 2 W. 4, c. 56. The 1st section of the 5 & 6 Vict. c. 116, enables any person not being a trader, or, being a trader owing less than 800*l.*—having previously, by advertisement in the London Gazette, and in some newspaper circulating within the county wherein he resides, given notice of his intention to one-fourth in number and value of his creditors,—to present a petition for protection from process, to the court of bankruptcy, if he has resided twelve calendar months in London or within the London district; or to the commissioner in the county within whose district he may have resided twelve calendar months. By the 7 & 8 Vict. c. 96, ss. 1, 3, the notice is required to be given, not by the insolvent, but by the commissioner. And the 7th section *enacts, "that, whenever [*448 any such petitioner is a prisoner, under any process, attachment, execution, commitment, or sentence, and is not entitled to his discharge, (under s. 6,) the commissioner may, by warrant under his hand, directed to the person in whose custody such petitioner is confined, cause such petitioner to be brought before him for examination at any sittings of the court, whether public or private; and such person shall be indemnified by the warrant of the commissioner, for bringing up such petitioner." Here, although absent from London for a temporary purpose at the time of his arrest, Carrol was, and for more than twelve months had been, resident within the London district, where his wife and family still remained. The commissioner was the person to judge whether or not the petitioner was a person entitled to the protection of the act. In the *Case of the Marshalsea*, 10 Co. Rep. 68 b, Lord COKE says—"A difference was taken when a court has jurisdiction in the cause, and proceeds *inverso ordine* or erroneously; there, the party who sues, or the officer or minister of the court, who executes the precept or process of the court, no action lies against them. But, when the court has not jurisdiction of the cause, there the whole proceeding is *coram non ju-*

(a) (Translated, 10 Vin. Abr. 85;) citing *Mayo v. Probey*, 1 Roll. Rep. 440, (S. C. Cro. Jac. 419, 3 Bulstr. 198, 201;) and referring to *The Earl of Kent v. Schene*, P. 16 E. 4, fo. 3; *Acron. M.* 6 H. 7, fo. 11, 12, pl. 9; *Dyer*, 241, pl. 47.

(b) And see *Ex parte Kinning*, post, p. 507.

die, and actions will lie against them, without any regard of the precept or process : and therefore the said rule cited by the other side—‘*Qui jussu judicis aliquod fecerit*, (but when he has no jurisdiction, *non est judex*,) *non videtur dolo malo fecisse ; quia parere necesse est*’—was well allowed ; but it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger ; for, the rule is, *judicium a non suo (a) judice datum, nullius est momenti*. And that fully appears in our books ; and therefore in the case betwixt *Bowser* and *Collins*, M. 22 E. 4, fo. 88 b, PIGOT says, If the court has not power and authority, *then their proceeding is *coram non judice* : as, if the Court *449] of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice ; quod omnes concesserunt*. But, if the Court of Common Pleas, in a plea of debt, awards a *capias* against a duke, earl, &c., which by the law doth not lie against them, and that appears in the writ itself ; and, if the sheriff arrests them by force of the *capias* ; although the writ be against law, notwithstanding, inasmuch as the court has jurisdiction of the cause, the sheriff is excused. And therewith agrees 88 H. 8, (Dyer, 60 b.) The same law, if a justice of peace makes a warrant to arrest one for felony who is not indicted, although the justice errs in making the warrant, yet he who makes the arrest by force of that warrant, shall not be punished by writ of false imprisonment, because he is judge of the cause : and therewith agrees 14 H. 8, 16 a.” *Andrews v. Marris*, 1 Q. B. 3, 1 Gale & D. 268, is also a distinct authority, that, even assuming that the commissioner’s warrant was irregular, inasmuch as the commissioner had a general jurisdiction, it afforded a justification to the sheriff, and he is not liable for having obeyed it. In that case, a court of requests act (47 G. 3, sess. 2, c. lxxviii.) enacted, that, when the commissioners should have made an order on a defendant for payment of money, the said commissioners, present in court, might award execution against the body or goods of such defendant ; that thereupon the clerk of the court, at the prayer of the plaintiff, might issue a precept under his hand and seal, by way of *ca. sa.* or *fi. fa.*, to the serjeants of the court, who should execute the same ; and that it should be lawful for the commissioners, if they should think fit, to order any debt due to the plaintiff to be paid *450] by *instalments, on such terms as might appear to them reasonable ; and that it should also be lawful for the said commissioners present in court, on default in paying any such instalment, at the instance of the plaintiff, and on due proof of such default, to award execution against the defendant, or his sureties, for the whole debt, or such part as should remain unpaid, with such further costs as should seem to them reasonable, to be recovered in the same manner as the original debt. And it was held, that, after a simple award of execution, the clerk might issue a precept for carrying it into effect, without further

(a) See Calv. Lex. voc. *Suillas*.

intervention of the court: but that, where the commissioners had ordered the debt to be paid by certain instalments, "or execution to issue," the clerk could not, on default of payment, and application to him by the plaintiff, issue a precept for execution, without further intervention of the court; (a) for, that the commissioners were required, when acting upon such default, to exercise judicial functions, which could not be delegated; and therefore that the clerk, having made such precept, which had been executed, was liable in trespass, although the proceeding was conformable to the practice of the court, for, the court could not institute such a practice: *but that the serjeant executing such precept, was protected by it.* (b) In *Thomas v. Hudson*, the plaintiff having obtained judgment against one F., in an action of *assault and false imprisonment*, sued out a *ca. sa.*, whereon F. was taken and committed to the Queen's prison, of which the defendant was the keeper: F. afterwards petitioned the court of bankruptcy for his discharge under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly: the plaintiff *having brought an action against the defendant for an escape, it was [451 held, that whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, *being bound to obey the order of the commissioner*, who was acting judicially in a matter over which he had jurisdiction. ALDERSON, B., in delivering the judgment of the court, there says: "The commissioner, it is true, has but very imperfect means of enabling him to come to a decision in these matters; nothing but the petition and affidavit: still, he has these documents, and on these he must exercise his judgment, and by that judgment all persons must be bound. The decision may be wrong, but it is a decision by the proper authority, and, if wrong, comes within the principle laid down in *The Marshalsea case*, that orders by a competent authority, though made *inverso ordine*, are a protection to those who act under them." [MAULE, J. That case is now pending in error.] The purpose for which the case is here cited, is unaffected by the appeal.

Carrol's state of health amply justified the officer in not taking him back to Presteigne on the Saturday night. And nothing that occurred in the interval between the decision of the commissioner dismissing his petition, and his commitment to the Queen's prison, amounts in law to an escape. Reliance was mainly placed at the trial, upon the circumstance of the prisoner having been allowed to spend a portion of the Sunday at The Spaniards, at Hampstead. [MAULE, J. Was any question left to the jury, as to the *relaxation* of the custody?] None. In *Boynton's case*, 3 Co. Rep. 48, (c) Boynton was taken in execution under

(a) See *Ex parte Kinning*, post, p. 507.

(b) And see *Carratt v. Morley*, 1 Q. B. 18.

(c) (*Boynton v. Andrews*, in *auditiâ querelâ*;) S. C. per nom. *Burton v. Andrews*, Sir F. Moore, 299.

a ca. sa. by the bailiffs of a liberty in Suffolk, under warrant from the sheriff of the county; the bailiffs, *in bringing him to West-
 *452] minster at the return of the writ, carried him, at his own request, to Lambeth, which was out of the way from Suffolk to Westminster; and this was held to be no escape. The court resolved, that "there was a difference between the custody of one in execution *within the franchise or county* where the common jail is, or the office of the sheriff or bailiffs extends, and where the sheriff or bailiff hath the custody of one in execution *out of their franchise or county*,—as in the case at bar,—by force of a writ: for, if the sheriff, or bailiff of a liberty, assent that one who is in execution, and under his custody go out of the jail for a time, and then to return, although he return at the time, yet it is an escape. So, if the sheriff, &c. suffer him to go by bail or baston; (a) for, the sheriff or bailiff ought to keep him *in salvo et arcto custodiâ*. (b) And the statute of Westminster 2, c. 11, saith *quod carceri manucipentur in ferris*, so as the sheriff may keep them who are in execution in fetters and irons, to the end that they may the sooner satisfy their creditors. And with that agrees a resolution, Trinity, 24 H. 8, by the advice of FITZJAMES and NORWICH, chief justices, and FITZHERBERT and SPILMAN, Js., that, by the law, those who are in execution shall not go at their liberty within the prison, nor out of the prison with the keeper, but shall be kept in strict ward. (c) But it was adjudged, where the sheriff hath one in execution for debt, and a *habeas corpus* issues out of the King's Bench, to have the body of him who is in execution, in the
 *453] same court at a certain day; *by force of which writ the sheriff, before the return of the writ, brings his body to an inn in Smithfield towards Westminster, and the prisoner, of his own head, goes, without any keeper to Southwark, in the county of Surrey, and the next morning comes again to the sheriff, to Smithfield, and, at the return of the *habeas*, the sheriff delivers his body in court; this was no escape. (d) And so it was adjudged in this court, 31 Eliz., in *Charnock's case*, who was sheriff of Bedford; for, the effect of the command of the writ was performed, *scil.* to have his body in the King's Bench, such a day: and this stands with great reason, for, the sheriff, &c., may more strongly guard his jail than every inn or other place through which he travels; *a fortiori*, in the case at bar, for, he was always under the custody of the bailiffs. And the writ doth not command the sheriff to bring him the direct or usual way to Westminster, &c., but only to have his body

(a) i. e. one of the warden of the Fleet's servants or officers, who attended the King's court, with a red staff, for taking such persons into custody who were committed by the court. See statutes 1 Ric. 2, c. 12, 5 Eliz. c. 23. Note to Thomas and Fraser's edition of Coke's Reports, Part 3, p. 123, n. (D.)

(b) And see Co. Litt. 280 a; 2 Inst. 381.

(c) Vide Dyer, 249 b, and the statutes of Westminster 2, c. 11, and 2 Ric. 2, c. 12.

(d) *Benet v. Halsey*, Sir F. Moore, 257. And see Comyns's Digest, tit. *Escape* (D); 10 Vinier's Abridgment, tit. *Escape* (A), pl. 27; Bacon's Abridgment, tit. *Escape in Civil Cases* (B), 2; Bull. N. P. 67 b; 1 Rolle's Abridgment, tit. *Escape* (C).

in the King's Bench, &c., such a day." The result of the authorities seems to be, that, *within* his bailiwick, the sheriff is bound to keep the party *within the walls of the jail*; but that, when *out* of his own bailiwick, his duty is performed if he has him in *safe* custody. In any way of viewing the case, therefore, there has been no escape here.

Channell, Serjt. (with whom was *Pearson*), in support of the rule. The commissioner clearly had no jurisdiction in this case; and the want of jurisdiction was apparent on the face of the warrant; which, therefore, affords the sheriff no justification. The sheriff knew that Carrol was in Presteigne jail for several months *prior to the date of his petition. [MAULE, J. A continuous residence within the [*454 district for twelve months, *during any part of a man's life*, would seem literally to satisfy the words of the statute.] *Brown v. Crompton* is precisely in point. The statute 37 G. 3, c. 112, authorized the justices of the peace, "at the first or second general quarter session, or general session, to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances. The justices in Southampton, at an adjourned session held just after the act passed,—the adjournment being of a session holden before the act passed,—ordered the keeper of the sheriff's prison to discharge an insolvent. It was held—first, that the adjourned session had no jurisdiction—secondly, that the officer was not justified in obeying the order of sessions—thirdly, that the sheriff was answerable in damages to the plaintiff at whose suit the insolvent was in custody, for the act of the jailer in discharging the insolvent. GROSE, J., there says: "I agree with the doctrine laid down in 10 Coke, (*The Marshalsea case*), that an officer is not justified, who acts in obedience to a court that has no jurisdiction." In *Thomas v. Hudson*, the commissioner was acting judicially, and in a matter within his jurisdiction. In *Watson v. Boddell*, 14 M. & W. 57, the plaintiff, being a debtor to a bankrupt's estate, was summoned to appear and be examined before the district court of bankruptcy in which the *fiat* was prosecuted; but, refusing to come, was arrested by the defendant, the messenger of the court, under a warrant of the commissioner, and brought up in custody to be examined. He thereupon submitted to be examined; and, at the conclusion of his examination, the commissioner said that he was "discharged, on payment of the costs incurred in *bringing him up," and a [*455 memorandum to that effect was endorsed on the warrant. The defendant, in consequence, detained the plaintiff until the costs incurred in bringing him up were taxed, and payed by him under protest. It was held that the commissioner had no jurisdiction, under the bankrupt acts, to make such an order, and would have been liable to the plaintiff in an action of trespass for the imprisonment under it; and therefore that the defendant, who must be assumed to have known of such want of jurisdiction, was also liable. In Rolle's Abridgment, tit. *Escape*

(D), (a) it is said: "Si home en execution en le Fleete, procure un *habeas corpus* in Trinitie terme, returnable en Mich. terme prochain ensuant, en ascun court del Westminster, et in le mesne temps ale en le pais entour ses besoignes ou recreation et hors de prison, mais ove un baston ou keeper, uncore cest un escape." (b) And, in Bacon's Abridgment, tit. *Escape* (B), it is said that "Every person in prison by process of law, is to be kept *in salvo et arcta custodia*, in order to compel him the more speedily to pay his debts, and make satisfaction to his creditors. Therefore, if the sheriff or other officer who hath the custody of a prisoner, either bail him, when he is not bailable by law, or suffer him to go out of the limits of the prison, though with a keeper, and for ever so short a time, it is an escape. So, if the sheriff carry him round about a great way, for the accommodation of the prisoner, it is an escape." *Boyton's case* has undoubtedly established a distinction between the custody of a prisoner in the sheriff's own bailiwick, and his custody out of the bailiwick. But the facts of this case disclose a course of conduct on the part of the officer that was quite inconsistent with his duty. [MAULE, J. Was the officer bound to keep his prisoner in *456] one room, or in one house, or one *parish?] He was, at all events, not justified in permitting him to go about for his own pleasure. [MAULE, J. Is it not enough that he is in safe custody? Must he necessarily be debarred all recreation or amusement?] A prisoner in execution ought not to be made so comfortable as to remove from him all inducement to the payment of his debts.

If the warrant of the commissioner could afford any defence, it is one that is not available under not guilty. The operation of that plea is in no respect enlarged or extended by the new rules. [TINDAL, C. J. "Not guilty" means, that the sheriff did not permit the prisoner to escape, or it means nothing. This point, however, was not made, either at the trial or on moving for the rule nisi.] *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

This case was argued before the late lord chief justice, whose opinion on the subject is not known, and my brothers CRESSWELL and ERLE, and myself.

It was an action against the sheriff of Radnorshire, for suffering one Carrol, who was in his custody upon a *capias ad satisfaciendum*, to go at large. The defendant had pleaded not guilty, with other pleas not material to be adverted to.

It appeared in evidence, that Carrol, being in custody of the sheriff of Radnorshire, by whom he had been arrested in the month of November, 1845, petitioned the court of bankruptcy in London for protection against process; and the commissioner to whom the same was allotted, issued his warrant to bring up Carrol before him for examination.

(a) Translated 10 Vin. Abr. 87, pl. 9, citing Hob. 173.

(b) This was a resolution of the House of Commons.

Carrol was accordingly brought up to town on Saturday, the 24th of January, and was taken before the commissioner on the same day; and *about two o'clock on that day his petition was dismissed.

It was contended, on behalf of the plaintiff, that, inasmuch as [*457 the petitioner, Carrol, was not residing within the London district at the time of petitioning, the commissioner had no jurisdiction to issue his warrant to bring him up; and that the bringing him up in obedience to the warrant made the sheriff liable for an escape.

It is not necessary for us to decide whether a prisoner in custody in execution can apply to any other court than that within the district of which he has resided for the last preceding twelve months; since, upon the facts proved in this case, we do not think that question arises. It appears from the report of my brother ERLE, before whom the cause was tried, that the prisoner was taken, in custody, to Presteigne on the 10th or 12th of November, 1845, and that he had resided before that time in several places in Middlesex, Surrey, and London, for twelve months, occasionally absenting himself, but always with the intention of returning; and that he had lodgings kept on during all that time, and down to March, 1846, where his wife lived. Under this state of circumstances, it appears to us, that, although absent, for some temporary purpose, from the London district at the time of his arrest, still he must be considered, in point of law, as a resident within the London district, within which he had a permanent lodging, where his wife was residing, and to which it was his intention to return. The prisoner, therefore, was, we think, authorized to petition the court of bankruptcy; and the commissioner before whom he was brought up had jurisdiction to act in the matter of the petition. This ground of objection, therefore, fails.

But it was further contended by the plaintiff, that, *admit- [*458 ting the bringing the prisoner up was justifiable by virtue of the commissioner's warrant, still the subsequent conduct of the officer whilst in town had made the sheriff liable for an escape.

It appeared in evidence, that the prisoner was brought to London, under the warrant of the commissioner, on Saturday, the 24th of January; and about 2 o'clock on that day, the petition was dismissed. On the same day, a writ of *habeas corpus* was issued, which was lodged with the town agent of the sheriff of Radnorshire before 5 o'clock on that day, and served on the bailiff who had the prisoner in custody. The original writ was sent down into Radnorshire, and the return was sent up to London, where it arrived on Monday; and, on that day, the prisoner was taken before a judge, and by him committed to the Queen's prison. The prisoner was at the time in a bad state of health, and could not have been taken back to Presteigne on the Saturday, without much inconvenience and risk; and it was not contended, on the trial, that the bailiff was chargeable with any unreasonable delay in remaining in

town till the Monday ; but it appeared, that, in the interval, the prisoner had been taken to different places in London and Middlesex, and, in particular, on the Sunday, to an inn at Hampstead, called The Spaniards, where he had passed the day : and it was contended, that, on this account, the sheriff was liable as for an escape. It was, however, proved that the prisoner, during the whole time he remained in London and Middlesex, till he was committed to the Queen's prison, was accompanied and closely watched by the sheriff's bailiff, by day and by night. The prisoner, therefore, was kept in as close custody as it was possible for the sheriff to keep him in in a foreign county, in which he had no prison of his own : and that such a mode of custody is sufficient to prevent the sheriff from being liable as for an escape, appears from **Boyton's case*, *459] 3 Co. Rep. 43. That case was adverted to in the case of *Hawkins v. Plomer*, Sheriff of Middlesex, 2 W. Blac. 1048 : and Lord Chief Justice DE GREY, in giving the judgment of the court, referred to several cases, the resolutions in which, he said, obviated the inconvenience of the doctrine laid down in 3 Co. Rep. 44. Those resolutions show that the doctrine alluded to, is, that, where it is said, that, where the sheriff has one in execution for debt, and a *habeas corpus* issues out of the King's Bench, to have the body of him who is in execution, in the same court, at a certain day, by force of which writ the sheriff, before the return of the writ, brings his body to an inn in Smithfield, towards Westminster, and the prisoner, of his own head, goes, without any keeper, to Southwark, in the county of Surrey, and the next morning comes again to the sheriff to Smithfield, and, at the return of the writ, the sheriff delivers his body in court ; this is no escape. Those resolutions establish the doctrine for which they are cited in *Hawkins v. Plomer*, that, upon a *habeas corpus*, the warden and marshal shall have only a convenient time to bring the prisoner into court and back again, which if they exceed, it is an escape ; and they are an authority for holding that the sheriff in the present case, after the prisoner's petition was dismissed, was bound to take him back to jail within a convenient time ; but, subject to this distinction, the doctrine established by *Boyton's case*, as to the degree of strictness with which the sheriff is to guard his prisoner during the time the prisoner is necessarily beyond the limits of the sheriff's county, has not, we apprehend, ever been overruled.

We think, therefore, that, in this case, the custody was sufficient, and that the rule for a new trial ought to be discharged.

Rule discharged.

*STEWART v. STEELE. May 6.

[*460]

The master, in taxing the costs of a trial, having allowed a large sum for costs incurred in the execution of a commission for the examination of witnesses in India, without exercising any discretion as to the propriety of the particular charges.—The court directed him to review his taxation.

THIS was an action upon a policy of insurance upon the ship *Sherburne*. At the first trial, which took place before TINDAL, C. J., at the sittings in London after Hilary term, 1841, a verdict was found for the plaintiff. That verdict was afterwards, in Trinity term, 1842, set aside, and a new trial directed, upon payment of costs.(a) Upon the second trial, at the sittings in London after Michaelmas term, 1846, a verdict was found for the defendant. On the taxation of the defendant's costs, a claim was made before the master, of a sum of 658*l.* 5*s.* 8*d.*, which had been paid by the defendant as the costs of executing a commission issued by him for the examination of witnesses in the East Indies, and for his costs of attending a commission issued by the plaintiff for the like purpose. The master, though requested by the plaintiff's attorney so to do, declined to exercise any discretion as to the propriety of these charges, saying that he had no means of forming any judgment on the subject; and he accordingly gave his *allocatur* for 1812*l.* 15*s.*, including the whole claim of 658*l.* 5*s.* 8*d.*

Willes, on a former day, obtained a rule nisi to review the taxation—COLTMAN, J., observing that it deserved consideration whether the master could properly refuse altogether to exercise his discretion.

Channell, Serjt., showed cause. The costs of and incidental to these commissions, are, by the terms of the *statute 13 G. 3, c. 63, s. 9, as well as by those of the orders founded upon the 1 W. 4, c. 22, s. 3, made costs in the cause. And, as there is no suggestion that the defendant has not paid the sum charged, there can be no reason why it should not be allowed. From the nature of the business done, it is quite impossible that the master could form any correct judgment as to the propriety of the various charges; and therefore it would be idle to send the bill again before him. [*461]

Willes, in support of his rule, submitted that it was manifestly unjust that the master should, without attempting to exercise any discretion at all, allow all the costs of the commissions, as between attorney and client.

COLTMAN, J. It may ultimately turn out that the entire sum claimed ought to be allowed. But the court is of opinion that the master should look at the bills, and exercise his discretion in the best way he can.

Rule absolute.(b)

(a) See 4 M. & G. 669, 5 Scott, N. R. 927.

(b) And see *Clay v. Stevenson*, 3 A. & E. 807, 5 N. & M. 318; *Steinkeller v. Newton*, 1 Scott, N. R. 148, 8 Dowl. P. C. 579, 6 M. & G. 30, n. & 31, n.

*462] *THE ELECTRIC-TELEGRAPH COMPANY *v.* JOHN NOTT, JOHN GAMBLE, and DOUGLAS PITT GAMBLE. THE SAME *v.* JOHN GAMBLE, DOUGLAS PITT GAMBLE, and JOHN NOTT.

THE SAME *v.* DOUGLAS PITT GAMBLE, JOHN NOTT, and JOHN GAMBLE. *May 6.*

In an action for infringing a patent, the court has a general power to order a particular of the alleged infringements.

But, where the specification claimed a combination of numerous improvements, (in electric telegraphs,) the court refused to compel the plaintiffs to give the defendants such particulars,—conceiving, that from the nature of the patent, the plaintiffs would be thereby put to great difficulty and embarrassment, and that, under the circumstances, (the matter having been debated in Chancery upon a motion for an injunction,) the defendants must be taken to possess adequate information on the subject.

THREE several patents were granted to W. F. Cooke and C. Wheatstone, for a combined apparatus for communicating between distant places, by means of magnetic needles and conducting wires, dated respectively the 12th of June, 1837, the 21st of January, 1840, and the 8th of September, 1842. The interest of Messrs. Cooke and Wheatstone in these and certain other patents was, by an act of parliament passed in 1846, 9 & 10 Vict. c. xlv., assigned to, and vested in, The Electric-Telegraph Company.

On the 20th of January, 1846, a patent was also granted to the defendant Nott for an electro-magnetic direct-action telegraph, the title of such patent being for “Improvements in communicating intelligence from one place to another.” The other defendants were interested in this patent.

On the 13th of November, 1846, the plaintiffs filed a bill against the defendants for alleged infringements, under colour of the letters-patent *463] granted to Nott, of *the several letters-patent granted to Cook and Wheatstone as above mentioned, praying, amongst other things, that the defendants might be restrained, by injunction, from making, using, exercising, putting in practice, or vending the said inventions and improvements respectively mentioned in the said several letters-patent. The bill referred to five several patents, and the infringements were alleged generally in respect of such five patents.

The motion for an injunction came on for argument before the Vice Chancellor of England in Hilary term last, when his honour, without hearing the defendants’ counsel, declined to grant an injunction, but gave the plaintiffs leave to bring such action at law as they might be advised. Against this decision the plaintiffs appealed to the Lord Chancellor. The appeal was heard on the 10th, 12th, 17th, and 19th of February; and, on the 24th, the Lord Chancellor gave judgment, affirming the Vice Chancellor’s decision, with costs.

On the 30th of March last, three separate actions were brought by the

plaintiffs against the defendants for alleged infringements of the patents respectively granted to Cooke and Wheatstone on the 12th of June, 1837, the 21st of January, 1840, and the 8th of September, 1842. The declarations in these actions were delivered on the 8th of April last; and, on the 12th, the defendants' attorney wrote to the plaintiffs' attorneys, requesting to be furnished with particulars in writing of the infringements on which the plaintiffs intended to rely, and that they would point out, by reference to the specifications and drawings of the respective patents, the parts of the invention which the plaintiffs alleged to have been infringed. In reply to this letter, the plaintiffs' attorneys, on the 14th, wrote as follows:—"We beg to state that such infringements are contained in the electric *telegraph which the defendants have erected at and between Northampton and Blisworth. You must [*464 have been fully aware, after the protracted discussions in Chancery, that these were the infringements on which the plaintiffs intended to rely; and the plaintiffs are advised that you are not entitled, under the circumstances, to ask any further particulars."

Webster, on a former day in this term, on behalf of the defendants, obtained a rule calling upon the plaintiffs to show cause why they should not deliver to the defendants' attorney particulars in writing of the alleged infringements for which the actions were respectively brought. The affidavits upon which the motion was founded, in addition to the foregoing facts, stated that the specification of the letters-patent of the 12th of June, 1837, upon which the first action was brought, consisted of fifty-nine closely printed octavo pages, and was accompanied by three sheets of drawings with about forty separate figures, and contained nine several and distinct heads or claims of invention and improvements in electric telegraphs; (a) that the specifications of the letters-patent of the 21st of January, 1840, upon which the second action was brought, consisted of sixty-one pages, *and was accompanied by four sheets of drawings, with about forty distinct figures, and contained seven distinct heads or claims of invention, distinguished respectively by the letters G. to N. inclusive; that the specification of the letters-patent of the 8th of September, 1842, was also exceedingly voluminous, and was accompanied by two sheets of drawings, with about fifty distinct figures; that the infringements alleged in the declaration were altogether distinct from the infringements alleged in the proceedings in Chancery; that the defendants were altogether without information as

(c) These, in substance, consisted—first, in the improvement in communicating angular motions to magnetic needles by means of electric currents, in disposing the needles in vertical planes, in making the needles heavier at one end, and in providing stops to the needles,—secondly, in combining several needles on one dial,—thirdly, in arranging the wires into a set capable of being acted upon by finger keys,—fourthly, in arranging the finger keys,—fifthly, in having duplicate dials at intermediate places,—sixthly, in communicating angular motions by the attraction of temporary magnetism,—seventhly, in sounding alarms in distant places, by the attraction of temporary magnetism,—eighthly, in sounding alarms by an additional voltaic battery,—ninthly, in sounding alarms by the evolution of gas.

to which of the several heads of invention in the specification set forth, the infringements were alleged to have been committed, and as to which parts of the said direct-action electro-magnetic telegraph were complained of; and that such particulars were, as the deponent (a) was advised and believed, necessary to the proper defence of the action, inasmuch as it was impossible to gather with certainty from the specifications to the said three several patents, or the proceedings in Chancery before mentioned, in what the said inventions really consisted, or of what alleged infringements the plaintiffs really complained. The case of *Perry v. Mitchell*, 1 Webster's Patent Cases, 269, was cited.

M. Smith and *R. H. Grove* now showed cause, upon an affidavit stating that, although, from the nature of the subject, the specifications were of considerable length, and of some difficulty, they were not at all ambiguous, but, on the contrary, remarkably clear, definite, and explicit; that they described, not a number of detached and separate things, but a combined apparatus for communicating between distant places by means of magnetic *needles arranged and poised in suitable proximity
 *466] to corresponding vertical dials placed at the different points of communication, with suitable lengths of insulated conducting wire extended between them, and with finger-keys and other arrangements at the terminal stations, for receiving or transmitting a communication,—also with means at each terminus for sounding an alarum at the other stations, and with subordinate arrangements for insuring the sounding of the alarum at great distances,—also with arrangements for detecting the place of any defect in the conducting wires; that the actions were brought for the infringements committed upon the letters-patent respectively set out in the declarations, by the erection and use by the defendants, under the letters-patent granted to the defendant *Nott*, of an electric telegraph on The London and North Western Railway, at and between Northampton and Blissworth; that the infringements complained of in these actions were the very same infringements which were complained of by the plaintiffs in Chancery, and not other or different infringements; that the defendants and their advisers must be fully aware of the grounds of infringement on which the plaintiffs intended to rely, inasmuch as the same had been very particularly stated by a number of deponents in the proceedings in Chancery, and explained with great precision and clearness by the plaintiffs' counsel, both before the Vice Chancellor and the Lord Chancellor, with exact references to the several specification and to models produced by the plaintiffs in illustration thereof, and to a model produced by the defendants in illustration of *Nott's* instrument; that it was believed that the application was made only for the purpose of embarrassing or delaying the plaintiffs; and that, in the deponent's judgment
 *467] and belief, it would be out of the power of the plaintiffs to give the particulars *applied for, without in a great measure recapitu-

lating their specifications, which would impose on them considerable difficulty and expense, without any useful result to either party, inasmuch as the defendants were already in possession of all the information which it was in the power of the plaintiffs to furnish.

The discussion that took place in Chancery removes the defendants from the only ground upon which this application could for a moment rest, viz. that they were ignorant of the precise nature of the infringements with which they are charged. The whole invention claimed by the plaintiffs consists of a combined apparatus, parts of which they suggest the defendants to have borrowed. The defendants make no affidavit. And they must know better than their attorney what mechanical equivalents they have used. In all cases of this sort, the difficulty thrown upon the patentee by compelling him to furnish particulars like those here sought, would very much peril the legitimate success of his action. *Perry v. Mitchell* is a totally different case. There the specification described several distinct pens; and the plaintiff could have no difficulty in specifying the particular pens which he charged the defendant with having made.

Webster, in support of the rule. Unless the court is prepared to overturn the case of *Perry v. Mitchell*, this rule must be made absolute. [CRESSWELL, J. It does not strike me that that case has much bearing upon the present. The plaintiff had obtained letters-patent for the manufacture of improved pens. His specification described thirteen different kinds of improvements, referring to them by numbers: and the defendant prayed that he might be informed what particular numbers he was charged with having infringed. WILDE, C. J., *referred to *Bulnois v. McKenzie*, 4 N. C. 127, 5 Scott, 419, 6 Dowl. P. C. 21, 1 Webster's Patent Cases, 260.] [468] There, the court held that they might, in virtue of their general jurisdiction over the proceedings in a cause, require a defendant to give further and better particulars of objections to a patent. So, here, the court has power to compel the plaintiff to inform the defendants of the particular infringements they mean to rely on. The several improvements which the plaintiffs claim as the invention of Messrs. Cooke and Wheatstone are quite as distinct as the different pens in the case of *Perry v. Mitchell*. [WILDE, C. J. One cannot help feeling, that upon a scientific subject like this, the affidavit of a scientific person would be more satisfactory than that of the attorney in the cause.]

WILDE, C. J. I think this rule cannot be made absolute; not because I doubt the power of the court to order the particular that is asked, if they deemed it proper, but because I am not satisfied that the case is one which calls for such interposition. I referred, in the course of the argument, to the case of *Bulnois v. McKenzie*, because there this court considered that it had an inherent jurisdiction to make orders of this nature, with a view to preventing a failure of justice. TINDAL, C. J., there says:

I feel not the slightest doubt as to the general power of the court to model and control the course of proceedings before them; and I protest against this most beneficial exercise of authority being stigmatized, as one of the learned counsel for the defendant has thought fit to do, as an usurpation of the courts of common law. If parties were driven, upon all occasions of the sort alluded to, to a court of equity, the expense and delay would be ruinous, and in many *cases would amount to an absolute denial of justice." The rest of the court also fully recognise the general jurisdiction to regulate and control the proceedings according as the justice of the case may require, in order to prevent surprise and misadventure. *Perry v. Mitchell* was but an instance of the application of that general principle. There, the plaintiff brought an action for an alleged infringement of a patent granted to him for the manufacture of steel pens, the invention consisting of certain combinations, some of which were old and some new. But, inasmuch as the specification described a great number of pens, the defendant very reasonably asked that he might be informed in respect of which of them the infringement was charged. And the court very properly granted it. It required no complication in the statement. The plaintiff could not be embarrassed by it. In *Bulnois v. M^cKenzie*, it is true, the order had reference to a proceeding on the part of the defendant: but the principle is the same. There, VAUGHAN, J., at chambers made an order, that the defendant's attorney should furnish to the plaintiff's attorney the names, description, and places of abode of the several persons respectively alleged in the notice of objections to have used the invention before the making of the letters-patent, and also the dates when the invention was so used: and the court modified that order, by rescinding so much of it as required the defendant to furnish the names and descriptions of those persons whose names and descriptions were not already given. If, therefore, this had been an application pointing to particulars which the plaintiffs might give without encountering any great difficulty or embarrassment, there could have been no doubt as to the jurisdiction of the court to compel them to furnish them. I do not, however, think that the particulars *here sought are of that description. The actions are brought for an alleged infringement of three several patents granted in respect of an invention which from its nature was not likely to be brought to perfection at one effort: and the plaintiffs complain of an infringement by means of an apparatus combining the principles of all the three patents. One cannot but perceive, that, in the simplest mode of laying before a jury the questions that must arise in such a case, much difficulty will unavoidably present itself. It, therefore, seems to me that the plaintiffs have been well advised in bringing separate actions on each of the patents. And I do not think the circumstances are such as would warrant the court in arresting the plaintiffs' proceedings until the required particulars are furnished. One cannot

fail to perceive the extreme difficulty that the plaintiffs would be under in drawing such particulars. Besides, the parties have been in Chancery, where the matter of the alleged infringement has undergone full discussion, not merely upon bill and answer, but upon affidavits, which must necessarily have set forth what was the precise nature of the infringement complained of. The defendants, therefore, must possess much more information than the defendant had in *Perry v. Mitchell*. Upon the whole, therefore the defendants have failed to satisfy my mind, that, by our withholding the particulars he seeks to have, he will be rendered liable to such a degree of surprise as to entitle him to call upon us for our equitable interposition to prevent a failure of justice. If, contrary to our expectation, he shall be placed in such a situation as to entitle him to relief, he will not fail to obtain it. Knowing the ingenuity of counsel in these matters, we cannot shut our eyes to the probability of as much discussion arising upon the particulars, if given, as upon the specifications themselves. *Without pretending to give any opinion upon the subject, it may be impossible for the plaintiff to point out which of the several heads of invention they charge the defendants with having imitated: it may be that the invention consists in the combination only. Seeing, therefore, that that which is required must necessarily very much embarrass the plaintiffs, and not being satisfied that there is any probability of surprise on the defendants from the want of it, or that they do not possess an adequate amount of information on the subject, though I entertain no doubt as to the power of the court to grant it, I am of opinion that this, at all events, is not a case for the exercise of that power.

The rest of the court concurring,

Rule discharged; the costs to be costs in the cause. (a)

(a) And see *Lord v. Hague*, Godson on Patents, 2d edit. p. 239; *Jones v. Berger*, 5 M. & G. 208, 6 Scott, N. R. 208; *Bentley v. Kighley*, 7 M. & G. 652, 8 Scott, N. R. 372.

*BELCHER and Others, Assignees of SOLOMON, a Bankrupt, v. JOHN GOODERED, sued by the Name of HENRY GOODERED. May 7. [*472]

A writ issued in an action intended to be brought against one John G., by mistake described him as Henry G., and was served upon Henry G. The mistake in the service being discovered, notice was given to Henry G. not to appear. A copy of a *pluries* summons was some months afterwards left at the residence of John G., the real defendant, still describing him as Henry G. The defendant gave this copy to Henry G., in whose name one Lewis, an attorney, entered an appearance, demanded a declaration, and afterwards (with full knowledge that the appearance was no appearance in the cause) signed judgment of non-pross, for want of a declaration:—The court set aside the judgment for irregularity, with costs to be paid by the attorney.

Upon the motion to set aside the appearance, the affidavit was intitled, in the matter of the attorney, in a cause between "A. B. and C. D., plaintiffs, and John G., sued by the name of Henry G., defendants:"—*Held*, that it was properly intitled.

A party who obtains a judge's order, can derive no benefit from it unless it be duly served upon his opponent.

A judge's order staying the proceedings until a given day, in order to afford time for an application to the court, does not dispense with the necessity of the ordinary notice of motion, in order to entitle the party to have his rule nisi drawn up with a stay of proceedings.

The court will not grant a rule calling upon an attorney to answer the matters of an affidavit.

On the 5th of February, 1846, a writ of summons issued at the suit of the plaintiffs, as assignees of the estate and effects of one Solomon Solomon, a bankrupt, against the defendant, who was therein by mistake named Henry Goodered, and described as "of The Saloon, Piccadilly." The writ was on the 9th of February, served, at the place named, upon Henry Goodered, the son of the defendant. The plaintiffs' attorney, upon discovering that the writ had been served upon the wrong person, wrote to Henry Goodered, to inform him that he had been served by mistake; and writs of *alias* and *pluries* summons were issued, still describing the defendant as Henry Goodered. On the 8th of January, 1847, a copy of the *pluries* summons was left with the defendant's *473] daughter, at his *dwelling-house, which copy the defendant afterwards gave to his son Henry Goodered. On the following day, the plaintiffs' attorney received notice from Lewis, an attorney, that he had appeared for the defendant, and would receive a declaration. Accompanying this notice was a demand to be informed if the writ had issued with the authority, and also of the residence, occupation, and quality, of the plaintiffs. On the 11th, Lewis served the plaintiffs' attorney with a summons for particulars of their demand; but COLTMAN, J., declined to make any order thereon. A summons was afterwards taken out, on behalf of the plaintiffs, calling upon Lewis to show cause why the appearance entered by him in the name of Henry Goodered at the suit of the plaintiffs, should not be set aside; and, on the 22d of February, COLTMAN, J., made an order accordingly. The plaintiffs' attorney, however, neglected to serve this order, but caused the appearance to be struck out.

Before the order had been obtained for setting aside the appearance, Lewis served the plaintiffs' attorney with a demand of declaration on behalf of Henry Goodered; whereupon the plaintiffs' attorney obtained an order for time to declare, without prejudice to their right to apply to set aside the appearance.

On the 3d of March, Lewis signed judgment of nonpros. for want of a declaration, in an action "*Belcher and Others v. Goodered*," and delivered a bill of costs, with notice of taxation for the following day. The plaintiffs' attorney thereupon took out a summons calling upon Lewis to show cause why the judgment should not be set aside for irregularity, there being no appearance to warrant the filing or delivery of a declaration, with costs to be paid by Lewis. Upon the hearing of this summons, ERLE, J., proposed to set aside the judgment, but intimated

an opinion that he had not *authority, at chambers, to order Lewis to pay the costs consequent upon a proceeding on his part [474] as an attorney, such proceeding not being in any cause pending. The plaintiffs' attorney thereupon elected to take an order to stay the proceedings upon the judgment of nonpros until the fifth day of this term.

Channell, Serjt., on a former day, moved for a rule calling upon Lewis to show cause why the judgment of nonpros for want of declaration, signed by him against the plaintiffs at the suit of Henry Goodered, should not be set aside for irregularity, no appearance having been entered in the cause to warrant the filing or delivery of a declaration, and why he (Lewis) should not pay to the plaintiffs, or their attorney, their costs of and occasioned by the several proceedings taken by him in the name or on the behalf of Henry Goodered, with the costs of the application; and why he should not answer the matters of the affidavit. [WILDE, C. J. You may take the first branch of the rule, but not the last. The courts have long since ceased to grant rules calling upon attorneys to answer the matters of an affidavit. The usual course is, first to dispose of that which relates to the suit, and then, if the circumstances warrant it, to move to strike the attorney off the roll.] The learned serjeant asked that the rule might be drawn up with a stay of proceedings. No notice of the intended application had been given; but he submitted that what passed before the judge in Lewis's presence, was tantamount to notice. [WILDE, C. J. I am not aware that an order to stay the proceedings, to afford time for an application to the court, has ever been held to dispense with the ordinary consequences of a want of notice of motion; and I am not disposed to make a precedent for it. Nor do I think the intimation given to the attorney, when the parties were before the judge, could have been *treated as a notice. You must take your rule without a stay of proceedings.] [475]

W. H. Watson and Archbold took a preliminary objection. The writ and the appearance are both in a cause of "*Belcher and Others v. Henry Goodered*;" the affidavit upon which this rule was moved, is intituled "*Belcher and Others v. John Goodered*," sued by the name of *Henry Goodered*," and therefore cannot be used, inasmuch as there is no such cause in court. The authorities upon the subject are clear. In *Shrimpton v. Carter*, 3 Dowl. P. C. 648, an affidavit intituled "*G. Shrimpton v. William Carter*, the elder, sued as *William Carter*,"—the cause being "*G. Shrimpton v. William Carter*,"—was rejected, as being badly intituled. So, in *Sims v. Prosser*, 15 M. & W. 151, where the writ of summons described the defendant as "*Frederick C. Prosser*," an affidavit sworn by him in support of a rule for setting aside the judgment for irregularity, the title of which described him as *Frederick Coulston Prosser*, (his real name,) was held irregular. And in *Borthwick v. Ravenscroft*, 5 M. & W. 31, 7 Dowl. P. C. 393, the defendant,

whose real name was *Henry Ravenscroft*,^(a) was described in the writ of summons and distringas as "*Humphrey D. Ravenscroft*:" on an application to set aside the distringas, he intituled his affidavit, "*Borthwick v. Humphrey D. Ravenscroft*, sued as *Henry Ravenscroft*;" and it was held incorrect, there being no such cause until appearance. [WILDE, C. J. *Borthwick v. Ravenscroft* was expressly overruled in *Jones v. Eldridge*, 4 M. & G. 266, 4 Scott, N. R. 951. There, an *476] affidavit to ground a motion to set aside a writ of *summons commanding C. E. (whose real name was C. D. E.) to answer A. B., was held to be properly intituled "*A. B. v. C. D. E.*, sued as *C. E.*" *Borthwick v. Ravenscroft* having been cited on the one side, and *Finch v. Cocker*, 2 C. & M. 412, 2 Dowl. P. C. 883,^(b) on the other, TINDAL, C. J., said: "The decisions that have been cited are contradictory; but I cannot distinguish this case from *Finch v. Cocker*, which has been relied upon by my brother Bompas. *Borthwick v. Ravenscroft* certainly decides the contrary. In this conflict of authority, the best way appears to be to decide in conformity with the case which is most consistent with good sense; and that case, I think, is *Finch v. Cocker*." Unless you can show an authority overruling *Jones v. Eldridge*, or distinguish it in principle from the present case, it will be useless to urge this point further.] *Finch v. Cocker*, upon the authority of which the case of *Jones v. Eldridge* proceeded, had in truth no affinity to it. In *Finch v. Cocker*, there was a proceeding in the cause—a bail-bond. [WILDE, C. J. The affidavit was intituled in accordance with the writ, and not with the bail-bond.] As a general principle, every affidavit made in the course of a judicial proceeding, must be so framed, that, if false, perjury may be assigned upon it. This affidavit is not so framed. Though a *defendant* may appear and show that he is sued by a wrong Christian name, it is not competent to the *plaintiff* to come, before appearance, with affidavits intituled in a manner differing from the title of the cause in the writ.

*477] *WILDE, C. J. The attempt to distinguish this case from *Jones v. Eldridge* (c) having failed, you must proceed to the merits.

W. H. Watson and *Archbold* showed cause. The judgment is per-

(a) So it stands in the marginal note in 5 M. & W.; but from both the reports of this case it appears that the real name of the defendant was Humphrey Davies Ravenscroft, and that he was sued as Henry Ravenscroft.

(b) Where, a rule having been obtained for setting aside a bail-bond on the ground of a variance in stating the defendant's name as Cocker, instead of Cocken,—the affidavit on which the rule was obtained being intituled "*Finch v. Cocker*," it was insisted that it ought to have been intituled "*Finch v. Cocken*, sued as *Cocker*,"—and the affidavit was *admitted* to be im properly intituled. It had been so *decided* in *Shaw v. Robinson*, 8 D. & R. 423.

(c) In *Jones v. Eldridge*, Tindal, C. J., says: "The heading amounts, in effect, to the defendant's saying—The plaintiff has sued me, John Adams Eldridge, by the name of John Eldridge." The same observation might have been made in *Shaw v. Robinson*, 8 D. & R. 423. But, in the principal case, the title of the cause was varied by the *plaintiff*, who were thus repudiating the title which they had themselves by mistake, but without any default in the defendant, imposed on the cause.

fectly regular. The order of COLTMAN, J., of the 22d of February, never having been served upon Lewis, he was not bound to take notice of it: *Wilson v. Hunt*, 1 Chitt. Rep. 647; *Kenny v. Hutchinson*, 6 M. & W. 134, 8 Dowl. P. C. 171; *Maple v. Woodgate*, 10 Jurist, 839; *Normanby v. Jones*, 3 D. & L. 143. To render that order available for any purpose, the plaintiffs' attorney should have served it, or, at all events, have given some intimation to the other side, that he was acting upon it.

Channell, Serjt., in support of his rule, was stopped by the court.

WILDE, C. J. This is a perfectly plain case. The application is against Lewis, an attorney, charging him with having improperly appeared for a party for whom there was no pretence for entering an appearance. It seems, that, on the 5th of February, 1846, a writ issued against the defendant by the name of Henry Goodered, describing him as of "The Saloon, Piccadilly." This writ was, by mistake, served upon Henry Goodered, the defendant's son. Now, it is not denied that the [*478
*defendant did formerly carry on business at The Saloon: and, as the son, as he states in his affidavit, had paid to the bankrupt, before his bankruptcy, all that was due from himself, he could not be very much surprised at receiving notice that he need not appear to the writ so served upon him. Ten months afterwards, a *pluries* writ of summons is served at the residence of the defendant, still calling him Henry Goodered. The defendant was then a debtor to the bankrupt's estate. But, having received from his daughter the copy writ left for him, he hands it to his son, who immediately causes an appearance to be entered, and demands a declaration. Can it be doubted that Lewis is a party to a manoeuvre to put the plaintiffs to needless expense? The plaintiffs, seeking to treat the appearance as unauthorized, apply to a judge at chambers to set it aside; and, on the 22d of February, they obtain an order for that purpose. As that order was not served, I agree that the plaintiffs can take no benefit under it. But Lewis having, with full knowledge that the appearance so entered by him in the name of Henry Goodered, was not considered or treated as an appearance in the cause, demanded a declaration, and signed a judgment of nonpros,—there being then no appearance to warrant the filing or delivery of a declaration, and consequently no proper demand of declaration,—I think the whole proceeding on his part was so irregular and unwarranted, that the present rule should be made absolute in its terms.

The rest of the court concurring,

Rule absolute.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were,
WILDE, C. J. MAULE, J.
COLTMAN, J. CRESSWELL, J.

ELDERTON v. EMMENS, The Secretary for the Time being of THE CHURCH OF ENGLAND LIFE AND FIRE ASSURANCE TRUST and ANNUITY COMPANY. May 25.

In assumpsit against a joint stock company, (sued in the name of their secretary,) the first count of the declaration alleged, that, in consideration that the plaintiff had agreed to become the *permanent* attorney and solicitor of the company, and to act as such, for reasonable reward, &c., the company *promised the plaintiff to retain and employ him as such permanent attorney, &c.*; and that, in pursuance of the agreement, the company did in fact retain and employ him, and the plaintiff acted, and had always from thence been ready and willing to act, as the permanent attorney of the company: and alleged, for breach, that the company wrongfully, and without any just or reasonable cause for so doing, discharged the plaintiff from being or acting as such attorney, &c.:—*Held*, that this count was not supported by proof of a resolution of the directors, that the plaintiff “be appointed *permanent solicitor* to the institution,”—the word *permanent* denoting, in such resolution, no more than a *general* employment, as contradistinguished from an *occasional* or *special* employment.

The second count alleged that it was agreed between the plaintiff and the company, that, from a certain day, the plaintiff, as the attorney of the company, should receive and accept a salary of 100*l. per annum*, in lieu of rendering an annual bill of costs for the business transacted by him for the company; and averred that, the said agreement being so made, in consideration that the plaintiff had, at the request of the company, (a) promised the company to perform and fulfil the same in all things on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, *and to retain and employ him as such attorney of the company, on the terms aforesaid*; and assigned for breach, that the company did not continue to employ the plaintiff as such attorney, but wrongfully, and without reasonable cause, dismissed him from such employment, &c.: *Held*, (but reversed in the Exchequer Chamber, post, 498, n.) that the agreement did not necessarily imply a

(a) The request appears to be immaterial: 1 M. & G. 266, n.

promise by the company to employ the plaintiff; and that, the consideration being exhausted by the mutual promises, there was nothing to sustain the latter branch of the company's promise, and that the count was bad in arrest of judgment.

THIS was an action against a society called The Church of England Life and Fire Assurance Trust and Annuity Company, (sued in the name of their *secretary,) for refusing to continue him in his employment as the solicitor of the company. [*480]

The first count of the declaration stated, that, on the 2d of February, 1841, in consideration that the plaintiff, at the request of the said company,(a) had agreed to become the *permanent* attorney and solicitor of the said company, and to act as such for reasonable reward to be therefore paid by the said company to the plaintiff for his services in that behalf, they, the said company, promised the plaintiff to retain and employ him as such permanent attorney and solicitor; that, after the making of the said agreement, and in pursuance thereof, to wit, on the day and year aforesaid, the said company did in fact retain and employ him as such permanent attorney and solicitor as aforesaid, and he the plaintiff then became and was, and acted as, the permanent attorney and solicitor of the said company, and had always from thence been ready and willing to continue to act as the *permanent attorney and solicitor of the said company, of which the said company had at all times [*481] notice; yet the said company, disregarding their said promise, did not nor would permit or suffer the plaintiff to continue to be the attorney and solicitor of the said company, or to act as such; but, afterwards, and before the commencement of the suit, to wit, on the 25th of May, 1845, without the consent of the plaintiff, and against his will, appointed certain other persons, to wit, J. C. and D. J. L. to be the attorneys and solicitors of the said company, and wrongfully, and without any just or reasonable cause for so doing, discharged the plaintiff from being or acting as the attorney and solicitor of the said company, and deprived him of all gains and profits which could have arisen or accrued to him in that behalf, to wit, gains and profits to the amount of 5000*l.*

The second count stated, that, on the 30th of November, 1844, it was agreed by and between the plaintiff and the said company, that, from the 1st of January then next, the plaintiff, as the attorney and solicitor of the said company, should receive and accept a salary of 100*l. per annum* in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the said company, as such attorney and solicitor, and should and would, for such salary of 100*l. per annum*, advise and act for the said company on all occasions, in all matters connected with the said company,—the prosecuting or defending of suits, the preparation of bonds or other securities for advances by the said company, and moneys disbursed by the plaintiff, being excepted,—and the plaintiff being allowed, in respect of such matters, to make the usual

(a) The request appears to be immaterial: 1 M. & G. 266, n.

and regular charges of an attorney or solicitor, and that he the plaintiff should attend the secretary of the said company, as well as the board of directors thereof, and the meetings of the proprietors thereof, when *482] required; that, the said agreement being *so made, afterwards, to wit, on the said 30th of November, in the year aforesaid, in consideration that the plaintiff had, at the request of the said company, promised the said company to perform and fulfil the same in all things on his part, the said company promised the plaintiff to perform and fulfil the same in all things on their part, *and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid;* and that, although the said company did, for a certain small space of time thereafter, to wit, for the space of four months, in pursuance and fulfilment of the said agreement, and of their promise in that behalf, retain and employ the plaintiff as such attorney and solicitor, on the terms aforesaid, and did pay him a small part of the said salary, to wit, 50*l.*; and although the plaintiff was, at all times from the making of the said agreement hitherto, ready and willing to advise and act for the said company, and accept the said salary, on the terms aforesaid, and in all other respects to fulfil the said agreement on his part, of which the said company always had notice; yet the said company, disregarding their said agreement and their promise, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor of the said company, on the terms aforesaid; but, on the contrary thereof, afterwards, and before the commencement of the suit, to wit, on the 25th of May, 1845, wrongfully, and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and then, and from thence until the commencement of the suit, had wholly refused to retain or employ him as such attorney and solicitor of the company, or to pay him the salary aforesaid; by reason of which premises, the plaintiff had wholly lost and been deprived of the said salary of 100*l.* and of divers great gains and profits which he might, and otherwise would, have de-
*483] rived from such *employment, in and about the prosecuting and defending of divers suits respectively brought by and against the said company, in and about the preparing of divers bonds, contracts, and securities, for the said company, and otherwise, to wit, to the amount of 5000*l.*, and had been and was in other respects greatly injured and damaged.

The declaration contained also counts for work and labour, and for money due upon an account stated.

The defendant pleaded—first, to the whole declaration, non assumpsit.

Secondly, to the first count, that, after the making of the promise in the first count alleged, and before the discharge of the plaintiff from the said employment, as in the first count mentioned, to wit, on the 1st day of January, 1845, and on divers other days between that day and the

time of his said discharge, the plaintiff did, in the way of his employment of attorney and solicitor to the said company, conduct and transact the business of and relating to the said company, in a manner greatly calculated to injure and prejudice the said company, and in disregard of the wishes and intentions of the directors of the said company; that the plaintiff did also act contrary to the wishes and intentions of the said directors, and did violate the duty of him the plaintiff as such attorney and solicitor, in this, to wit, that he the plaintiff, as such attorney and solicitor, contrary to, and in disregard of, the wishes and intentions of the directors of the said company, then known to the plaintiff, to wit, on the 10th day of May, in the year aforesaid, did cause a certain writ of execution, to wit, a writ called a writ of *capias ad satisfaciendum*, to be issued against a certain person, to wit, one J. A. Knipe, and did then also, contrary to, and disregarding, the said wishes and intentions, cause the said J. A. Knipe to be arrested for the non-payment of a very small sum of money, to wit, the *sum of 10*l.*, the same being [484 altogether costs incurred by the plaintiff, as such attorney and solicitor, in and about a certain action theretofore brought, on behalf of the said company, against the said J. A. Knipe, he, the said J. A. Knipe, at the time of the issuing of the said execution, being in necessitous and indigent circumstances, and unable to pay the said sum for which the said execution was so issued as aforesaid; that the plaintiff, having so caused the said J. A. Knipe to be arrested, did force and compel him, in order to obtain his liberation from such arrest, to pay to the plaintiff a certain small sum of money, to wit, 5*l.*, and also to deposit with the plaintiff certain goods, to wit, three maps,—which said conduct of the plaintiff, in the way of his said employment and retainer, was calculated greatly to injure and prejudice the said company, and to bring the said company into disrepute, and was so pursued by the plaintiff, not only against the wishes and intentions of the said directors, but without their knowledge thereof in any manner until after the said arrest and the said discharge of the said J. A. Knipe from custody as aforesaid; and that therefore, and because it was actually necessary for the interests of the said company, and to prevent their prospects and character from being damaged and injured by reason of the said conduct of the plaintiff in the way of his said employment, the said company, at the said time when, &c. in the said first count mentioned, did discharge the plaintiff from being and acting as the attorney and solicitor to the said company, as they lawfully might, for the cause aforesaid—verification.

Thirdly, a similar plea to the second count.

Fourthly, to the indebitatus count for work and labour, and the count on an account stated, payment.

The plaintiff joined issue on the first plea; replied to the second and third pleas, that the said company, of *their own wrong, and [485 without the cause in those pleas respectively alleged, broke their

said promises, as in the first and second counts respectively mentioned; and traversed the fourth plea.

The cause was tried before CRESSWELL, J., at the sittings at Westminster after last Trinity term. The facts that appeared in evidence were as follows:—Early in the year 1840, the plaintiff was engaged in the formation of a company, to be called The Church of England Trust and Assurance Institution. At that time, there existed an association called The City of London Loan and Annuity Company, between which and the first-mentioned society, it was proposed to form a junction, which was ultimately carried into effect,—the combined association being styled The Church of England Life and Fire Assurance Trust and Annuity Company. This company was afterwards, by an act of parliament, passed in the session of 1841,^(a) enabled to sue and be sued in the name of the managing director or other officer of the company for the time being.

To prove the agreement stated in the first count, the plaintiff offered in evidence the original draft of resolutions passed at a meeting of the directors of The Church of England Trust and Assurance Institution, held on the 18th of April, 1840, (the minute-book of the company having been called for, but not produced,) amongst which were the following:—Fifthly, “that Mr. E. M. Elderton (the plaintiff) be appointed *permanent solicitor* to the institution, and, as the founder thereof, be presented with one hundred shares, free from the deposit thereon, besides his professional charges.” Seventhly, “that Mr. W. S. Northhouse shall be the *interim* manager of the institution, and shall receive *486] for such management 500*l.* over and above his expenses out of pocket, on his resigning such management into the hands of the *permanent managers*,” &c. Eighthly, “that Mr. B. Jackson shall be the *permanent* manager of the institution in the city, at a salary of not less than 500*l. per annum*, over and above his expenses out of pocket.” Ninthly, “that Mr. C. Thomas shall be the *permanent* manager of the institution at the west-end office, on the same terms.”

These resolutions appeared to have been adopted by the directors of the joint association, at a meeting held by them on the 22d of April, and to have been signed by the chairman. At this meeting, an agreement was entered into on behalf of the new company, to *adopt all the contracts, agreements, and payments of the plaintiff*.

The reception of this draft of the resolutions was objected to, on the part of the defendant, on the ground that alterations appeared to have been made in it, and that there was no distinct evidence as to the time at which these alterations were made. The minute-book was, however, afterwards produced, when it was found that the resolutions had been copied into it by a clerk of the company, in their altered shape. There

was also evidence to show that the resolutions, as entered, had repeatedly been acted upon by the company.

In support of the second count, the defendant put in a letter addressed to him by the secretary of the company (the defendant) on the 30th of November, 1844, containing an intimation, that, at a meeting of the general board held on the preceding day, "it was resolved to accept the plaintiff's proposal to allow him, as solicitor of the company, from the 1st of January next, a salary of 100*l.* in lieu of his rendering, as at present, an annual bill of costs for general business:" and that, "by that arrangement, it was understood that the plaintiff would, for such salary of 100*l. per annum*, advise and act for the company on all occasions, in all matters connected with it (the only *exceptions being suits, [*487 bonds, or other securities for advances by the company, and moneys out of pocket,) and that he would also attend the secretary, as well as the board, and meetings of proprietors, when required."

On the part of the defendant, evidence was given to show the reasons for which the company had ceased to employ the plaintiff as their solicitor: and it was objected, that the first count was not proved, there being no sufficient evidence of the ratification or adoption by the new company of the resolutions of the 13th of April; and that, assuming those resolutions to have been properly received, the evidence did not support the breach,—the word "permanent" in the resolutions being used merely as contradistinguished from occasional or *ad interim*, and not in the sense in which the word must be understood to make the breach good, viz. as an appointment for life, or during the existence of the society.

For the plaintiff, it was insisted that the appointment was for life, and that there was no variance between the allegation and the proof of the contract declared on.

The learned judge directed the jury to find for the plaintiff on the first issue; but he intimated an opinion, that the resolution did not import an appointment for life, and he reserved to the defendant leave to move to enter a verdict on that issue as to the first count. The damages were separately assessed,—800*l.* on the first count, and 200*l.* on the second.

Byles, Serjt., in Michaelmas term last, obtained a rule nisi to enter a verdict for the defendant on the first issue as to the first count, or for a new trial, and to arrest the judgment as to the second count, or for a *venire de novo*. He cited Fitzherbert's *Natura Brevium*, 168 F. H.; Comyns's Digest, tit. *Justices of the Peace*, (B. 58); (a) 15 Vin. [*488 Abr. 323, tit. *Master and Servant*, (N.) pl. 5; *Wallis v. Day*, 2 M. & W. 281; *Hopkins v. Logan*, 5 M. & W. 241; *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790; *Aspdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, 5 Q. B. 685.

(a) Citing F. N. B. 168, H.; Co. Litt. 42 b.

Talfourd, Serjt., and *Peacock*, showed cause. The resolution by which the plaintiff was appointed solicitor to the company was properly received in evidence, and constituted a contract that was binding upon them. The word "permanent" implies an appointment, if not for life, at least for so long time as the society should require the services of a solicitor, and the plaintiff give no cause for dismissal. It is not like an appointment to a freehold office, and therefore need not be by deed. A mandamus would not lie to restore the plaintiff. There was ample evidence to show that the resolutions of the 18th of April had been recognised and adopted by the directors, after the formation of the new company. [COLTMAN, J. The united company, in agreeing to adopt the contracts, agreements, and payments of the plaintiff, do not, in terms, adopt the resolution appointing him solicitor, but merely acts done by him as agent for them.] It was beyond dispute, that the plaintiff's appointment had been ratified and assented to. The passage referred to in *Viner's Abridgment* is a translation from *Brooke's Abridgment*, tit. *Laborers*, pl. 44, who cites the *Year-Book*, 2 H. 4, fo. 15: (a) it has reference to the statute, 34 Ed. 3, c. 10, and certainly is no authority for the position for which it was relied on in this case.

*489] The objection to the second count, is, that the breach *alleged is larger than is warranted by the promise. It may be conceded, that, in declaring upon an agreement, the promise must not be extended beyond that which is necessarily implied. But here, the promise to retain and employ the plaintiff as the solicitor of the company, is necessarily implied from the terms of the agreement. [MAULE, J. Is not the subject-matter of the agreement limited to the regulation of the mode of payment for the plaintiff's services, during the continuance of his employment?] It is a contract to employ or to pay. All that is decided in *Aspdin v. Austin* is, that a contract to pay salary does not imply a contract to employ. There are, in effect, two breaches alleged: and, if one of them is well alleged, it will sustain the verdict. In *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70, (b) the court say: (c) "It is a settled rule, that, if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts." Here, there is a mutual agreement, on the one hand to perform the service, and on the other to pay, which, according to the case of *Pordage v. Cole*, 1 Saund. 319 h, implies a promise to retain and employ. At all events, the plaintiff is entitled to recover one year's salary; and the court may assess the damages; consequently, there is no ground either for arresting the judgment or for awarding a *venire de novo*.

(a) The case cited by Lord Brooke is not to be found in 2 H. 4; nor has it been met with elsewhere.

(b) *Dyeball v. Doe*, 2 M. & R. 184.

(c) 8 B. & C. 71.

Byles, Serjt., and *Hugh Hill*, in support of the rule. If the word "permanent" means permanent in such a sense as will support the breach, viz. for life, or so long as the society shall exist and shall require the services of a solicitor, as is contended on the part of the plaintiff, the first count is not proved. If, on the other hand, it *means "ordinary" or "regular," as contradistinguished from "occasional" [*490 or "*ad interim*," the count is bad upon the face of it. The context shows that the construction put by the plaintiff upon the resolutions of the 13th of April, 1840, is erroneous. The word "permanent" is used repeatedly in that document in a more limited sense. Thus, in the seventh resolution, Northhouse is appointed *ad interim* manager, until the appointment of a permanent manager. The eighth resolution is, that Mr. B. Jackson shall be the permanent manager of the institution, in the city, at a salary of not less than 500*l.* per annum; and the ninth, that Mr. C. Thomas shall be permanent manager at the west end office, on the same terms. A general hiring or retaining must be taken to be a hiring for a year: *Fitzherbert's Natura Brevium*, 168 F; *Comyns's Digest*, tit. *Justices of Peace*, (B. 58); *Co. Litt.* 42 b; *Beeston v. Collyer*, 4 Bingh. 309, 12 J. B. Moore, 552. The plaintiff, therefore, must rely upon the document that was objected to at the trial, in order to show a signed contract within the 4th section of the statute of frauds, 29 Car. 2, c. 3. An appointment for life must be by deed: *Brooke's Abridgment*, tit. *Laborers*, pl. 44; *Viner's Abridgment*, 15 Vin. 323, tit. *Master and Servant*, (N) pl. 5; *Wallis v. Day*, 2 M. & W. 281. [WILDE, C. J. We are all of opinion that the word "permanent" is not used in the resolution, in such a sense as will sustain the first count.]

In the second count, the plaintiff has undertaken to set out the contract according to its legal effect; and, as set out, it does not sustain the promise. There is no consideration for the promise to retain and employ; the only promise the law will imply here, is a promise to pay; and, the consideration being exhausted by the mutual promises, there is nothing to warrant the *subsequent promise: *Brown v. Crump*, [491 6 Taunt. 300, 1 Marsh. 567, *Hopkins v. Logan*, *Granger v. Collins*, *Jackson v. Cobbin*. (a) In *Williamson v. Taylor*, 5 Q. B. 175, by agreement between the defendant and the plaintiff, the defendant, being the owner of a colliery, retained and hired the plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and the plaintiff agreed to continue the defendant's servant during all the times the pit should be laid off work, and, when required, (except when prevented by unavoidable cause,) to do a full day's work on every working day: it was held that there was nothing in the agreement to warrant the allegation in the declaration, of a promise to employ the plaintiff at reasonable times for a reasonable num-

(a) And see *Kaye v. Dutton*, 7 M. & G. 307; 8 Scott, N. R. 495.

ber of working days during the term. *Aspdin v. Austin* is precisely in point. There, by agreement between the plaintiff and defendant, the plaintiff engaged to manufacture for the defendant cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him 4*l.* weekly during the two years following the date of the agreement, and 5*l.* weekly during the year next following, and also to receive him into partnership, as a manufacturer of cement, at the expiration of three years: and the plaintiff engaged to instruct the defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. The defendant afterwards covenanted by deed for the performance of the agreement on his part. It was held that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, although the defendant was

*492] bound by the express words *to pay the plaintiff the stipulated wages during those periods, respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part. So, in *Dunn v. Sayles*, a declaration, in covenant, stated, that, by deed between the defendant, and D., and the plaintiff, the plaintiff covenanted that D. should for five years from the date serve the defendant in the art of a surgeon-dentist, and attend nine hours each day; and the defendant, in consideration of the services to be done by D., covenanted with the plaintiff, that he, the defendant, would during the five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise,) pay D. 35*s.* per week for the first year, 2*l.* per week for the second and third, and 2*l.* 2*s.* per week for the fourth and fifth: that D. was in the service for some time after the making of the deed, until dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c., to the end of the five years; but that the defendant, during the term, refused to permit D. to remain in his service, and dismissed him. It was held, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach. It is said that the plaintiff is at all events entitled to a year's salary. But there is no express allegation that a year had expired, or a year's service been performed. [MAULE, J. The dates show it.] They are all laid under a *videlicet*, and therefore no aid can be derived from them: *Parkinson v. Whitehead*, 2 M. & G. 329, 2 Scott, N. R. 620. The promise and the breach are entire, and are not divisible; and, the damages being assessed generally, the judgment must be arrested. If, as in *Leach v. Thomas*, 2 M. & W. 427,

*493] there had been several breaches assigned, some being well and some ill assigned, a *venire de novo* might have been awarded. But the court cannot grant a *venire de novo*, unless the record warrants it: *Corner v. Shew*, 4 M. & W. 163; *Sheen v. Riekie*, 5 M. & W. 175. There is no distinct allegation of non-payment here: it is merely al-

leged that the company refused to pay. *Non constat* but that, notwithstanding that refusal to pay, the money may have since been paid.

WILDE, C. J. I am of opinion that a verdict should be entered for the defendant upon the first count, and that the judgment should be arrested as to the second count.

The contract alleged in the first count, is, that the company would retain and employ the plaintiff as their "permanent attorney and solicitor." Whether that means an employment for life, or so long as the company shall exist, or what, we have no means of judging. But I incline to think it means no other than a general employment, as distinguished from an occasional employment in particular matters. It seems to me to be impossible for the parties to have intended to use the word "permanent" here in the sense that has been suggested on the part of the plaintiff. Had such been their intention, the agreement would have contained a variety of stipulations that are not found in it. The defendant having pleaded *non assumpsit*, and leave having been reserved to him to enter a verdict upon that issue as to the first count, it will be material to see what was the evidence offered by the plaintiff in support of the promise laid in that count. It is, the course of conduct of the company, coupled with the resolution of the 13th of April, 1840. Assuming that the conduct of the company amounted to an adoption by them of that resolution, what was it that they did adopt? Does the resolution amount to a contract for employment such as *is
alleged in the first count? If the word "permanent" has no
force in the construction of this contract, then, inasmuch as the first
count is framed upon a notion that that word has a definite legal effect,
the result is, that the plaintiff has failed to give evidence to support the
promise alleged therein. [*494]

The second count sets forth a certain agreement, and alleges that, in consideration that the plaintiff had, at the request of the company, promised the company to perform and fulfil the same in all things on his part, the said company promised the plaintiff to perform and fulfil the same in all things on their part, *and to retain and employ him as such attorney and solicitor of the said company on the terms aforesaid*. What is the consideration for the promise of the company? The only consideration alleged is that which arises from the mutual promises: the whole is exhausted by the mutual promises. What is the consideration for the promise to retain and employ the plaintiff as their attorney and solicitor? There appears to me to be no consideration whatever to sustain that promise. Much doubt might arise in regard to the breach. But this case does not fall within the rule in 2 Wms. Saund. 171 a, that, where there are two causes of action alleged, the one good and the other bad, the latter may be rejected, and the damages referred to the former; because here the promise is entire. And, inasmuch as, the count being defective, it would be useless to award a *venire de novo*, it is the duty of the court to arrest the judgment.

COLTMAN, J. I am of the same opinion. The language of the first count is somewhat ambiguous. The promise alleged on the part of the company, is, to retain and employ the plaintiff as their permanent attorney and solicitor. The defendant having pleaded over, we must understand this allegation in such a sense as to give a colour of action.

*495] Therefore I think it obviously means *that the retainer was so far "permanent," that the company were not to be at liberty to dismiss the plaintiff without some adequate cause. When we look at the agreement itself, it is evident that the parties used that term in a sense totally different from that intended in the declaration. If so, there is a fatal variance, and the defendant is entitled to a verdict on the issue on non assumpsit as to the first count.

With respect to the second count, it appears to me also that the promise therein alleged is such as cannot be supported. It has been contended that the whole of that which is alleged as the promise, is implied in the agreement. The answer given to that argument, however, appears to me to be satisfactory. The agreement is not set out in terms, but the plaintiff undertakes to set out its legal effect. It contains no undertaking to retain and employ in the manner alleged, and there is no consideration for that part of the promise. Suppose an agreement between A. and B., that the former should sell and deliver to the latter a *horse* for 50*l.*, and the promise alleged was, that, in consideration of B. paying A. 50*l.*, A. promised to deliver to B. a *horse and a gig*. That is exactly this case; the promise is larger than the consideration. The count being bad, the judgment must be arrested.

MAULE, J. I also think the plaintiff has failed to prove the promise in the first count in the terms in which it must be understood. It states, that, in consideration that the plaintiff, at the request of the company, had agreed to become the permanent attorney and solicitor of the company, they, the said company, promised to retain and employ him as such permanent attorney and solicitor. It then alleges that the company did in fact retain and employ the plaintiff as such permanent attorney and solicitor; but that the company, disregarding their promise, refused to *496] permit him to *continue to be or to act as such attorney and solicitor. This must be understood to mean a promise to employ the plaintiff for some certain time. But the evidence does not support such a promise: it does not show any contract on the part of the company to retain and employ him as their attorney any longer than they should think proper. In fact, "permanent attorney" means no more an enduring engagement than "standing counsel." That being so, the defendant is entitled to a verdict as to that count, on non assumpsit.

I also think that the second count is bad, for the reasons already given. That count is founded upon an executed consideration, which will sustain only such a promise as the law will imply.^(a) Thus, if goods

(a) This must be understood with reference to those considerations from which, as in the

are sold, or work is done, without any specific agreement as to price, the law implies a promise to pay so much as the goods or the work may be reasonably worth. If the promise is alleged beyond that, it is not sustainable in law. Here, the count sets out the agreement between the plaintiff and the company, and then states, that, in consideration that the plaintiff, at the request of the company, had promised the company to perform the same on his part, they promised the plaintiff to perform the same in all things on their part, *and to retain and employ him* (the plaintiff) *as such attorney and solicitor of the said company on the terms aforesaid*. It is said that that is no more than what is implied from the agreement—a reiteration of what had gone before. That, however, I think is not so. I do not think the agreement amounts to a contract to employ the plaintiff even for one year. The stipulation for an annual payment of 100*l.* is merely *introduced in substitution for a yearly bill. But, assuming that the agreement does import [*497 a promise to employ the plaintiff for a year, it clearly does not import an undertaking to retain him as the permanent attorney and solicitor of the company in the way here alleged. It is said that two distinct breaches are alleged, and that the verdict may be sustained as to the one, or a *venire de novo* awarded. The promise, however, in my opinion is entire, and cannot be severed. The result therefore, would be, that, though the plaintiff had a verdict, the badness of the count would still prevent his recovering upon it. It is quite a mistake to say that there are two breaches. It is true, that, after alleging that the company, disregarding their agreement and promise, did not nor would continue to employ the plaintiff as such attorney or solicitor, the count goes on—but, on the contrary thereof, afterwards, wrongfully and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and from thence hitherto had wholly refused to retain or employ him as such attorney and solicitor, or to pay him the salary aforesaid. That is not properly a statement of a breach. An allegation of a refusal to pay is not necessarily a denial of payment. This, no doubt, is looking with extreme nicety at the count; but that is provoked by the argument that there are two breaches.

With respect to the date being laid under a *videlicet*, the case of *Parkinson v. Whitehead* cannot be considered of much authority, the counsel having, upon a slight intimation of opinion on the part of the court, prayed leave to amend.

CRESSWELL, J. I agree with the rest of the court in thinking that a verdict should be entered for the defendant on the first count, and that judgment should be arrested on the second.

case put by the learned judge, the law infers a precise promise. But A. may declare that, in consideration that he had, at the request of B, conferred a benefit on C, B. promised him, A., to pay him so much money, or to deliver to him a certain horse, a promise which would not be implied by law from such executed consideration.

*498] The declaration must be understood in the sense that *is intended by the plaintiff, and essential to the maintenance of his action.(a) The word "permanent" here was intended to denote a duration of time, and the evidence failed to sustain that construction.

The second count begins with stating the agreement. It then alleges, that, in consideration that the plaintiff, at the request of the company, promised to perform the agreement on his part, the company promised the plaintiff to perform the agreement on their part. Now, it is a well established rule, that, where you rely upon an executed consideration, you can only introduce such a promise as the law will imply.(b) The allegation of request in this case, can have no effect. The whole consideration being already exhausted by the mutual promises, it seems to me that nothing is left to sustain the subsequent promise to retain and employ the plaintiff as such attorney. Rule accordingly.(c)

(a) Ante, 354, 393.

(b) Vide supra, 496, n.

(c) The above judgment, so far as relates to the second count, was reversed by the Exchequer Chamber in T. V. 1848: vide post, Vol. V.

A writ of error, returnable in parliament, is now (Trinity vacation, 1848) pending.

To a declaration containing two special counts on two different contracts, a count for work and labour, and a count upon an account stated, the defendant pleaded, as to the whole, non assumpsit; to the first and second counts respectively, pleas in justification; and to the fourth, a plea of payment.

The verdict was entered for the defendant upon so much of the issue on non assumpsit as related to the first, third, and fourth counts, and for the plaintiff upon the special pleas; and the court arrested judgment upon the second count, in respect of which a verdict had been found for the plaintiff on non assumpsit.

Held, that the defendant was entitled to the general costs of the cause.

Held, also, that the master properly disallowed the plaintiff the expenses of witnesses called by him in support of, but not *exclusively* applicable to, the issue upon which he was successful.

May 12. The verdict having accordingly been entered for the plaintiff on the special pleas to the first and second counts, and on the plea of payment, and for the *defendant upon the issue on non *499] assumpsit as to the first, third, and fourth counts, and the judgment arrested as to the second count,—the master, in taxing the costs, allowed the defendant the general costs of the cause, including 48*l.*, for two copies of the company's deed of settlement. He also declined to allow the plaintiff more than nominal costs (40*s.*) in respect of the issue on which he succeeded at the trial,—the witnesses not being exclusively applicable to that issue.

Talfourd, Serjt., in Michaelmas term, (Nov. 4,) 1847, moved for a rule nisi to review the taxation. He submitted, that, under the circumstances, the defendant was not entitled to the general costs of the cause, relying upon *James v. Brook*, 16 Law Journ., N. S., Q. B. 168, that the plaintiff was entitled to the costs of the briefs and evidence applicable to the issues upon which he succeeded at the trial, citing *Nicholson v.*

Dyson, 11 M. & W. 545; *Daniel v. Barry*, 12 Law Journ., N. S., Q. B. 118; *Hart v. Outbush*, 2 Dowl. P. C. 456; and *Hazlewood v. Back*, 9 M. & W. 1; and that the allowance for two copies of the deed of settlement was excessive. A rule nisi having been granted,

Byles, Serjt., and *Hugh Hill*, in Hilary term,^(a) (Jan. 12, 1848,) showed cause. In allowing the defendant the general costs of the cause, the master has acted upon the universal practice of all the courts. The plaintiff has taken nothing by his writ. The statute of Gloucester, 6 Edw. 1, c. 1, gives costs to the *plaintiff* only where he is entitled to *damages*. The statute 23 H. 8, c. 15, s. 1,—which first gave costs to the *defendant*,—enacts that, “in trespass upon the statute of 5 Ric. 2, stat. 1, c. 8, debt, covenant, *detinue, account, trespass on the case, or upon any statute, for any offence or wrong personal, immediately [*500 supposed to be done by the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judge or judges of the court where such action shall be commenced or sued; and shall have such process and execution for the recovery of the same against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff.” Wherever the defendant succeeds upon an issue that goes to the whole cause of action, he is entitled to the general costs of the cause: *Hart v. Outbush*, 2 Dowl. P. C. 456; *Frankum v. Lord Falmouth*, 4 Dowl. P. C. 65.^(b) The case of *James v. Brook* is not reconcilable with any of the previous authorities,—to which the attention of the learned judge before whom that case was argued (c) was not called. It was there contended that the statute 23 H. 8, c. 15, s. 1, applied only where the plaintiff failed on *all* the causes of action; and that the defendant was entitled to no costs if the plaintiff succeeded on any cause of action, till the rule of Hilary term, 2 W. 4, s. 74: and *Norris v. Waldron*, 2 Sir W. Black. 1199, was cited. In his judgment, ERLE, J., says: “Before the statute of 23 H. 8, the defendant was not entitled to any costs. By that statute, and the 4 Jac. 1, c. 3, the defendant was entitled to costs, in case the plaintiff was nonsuited, or a verdict found against him. Those statutes gave the defendant no right to costs where the verdict was in part for the *plaintiff. By [*501 the 8 & 9 W. 3, c. 11, s. 2, the defendant became entitled to costs, if he obtained judgment, on demurrer; but that has no application here: therefore, until the rules of Hilary term, 2 W. 4, and Hilary term, 4 W. 4, the defendant in such a case as this was not entitled to any costs. These rules, as it appears to me, give him only the costs of the issues found for him. By the rule of Hilary term, 2 W. 4, r. 1, s. 74,

(a) The Judges present being, Wilde, C. J., and Maule, Crosswell, and V. Williams, Js.

(b) And see Archbold's Practice, 8th ed., by Chitty, 1376; 1 Wms. Saund. 300 c.

(c) Mr. Justice Erle. The judgment was delivered for him by Mr. Justice Wightman.

the plaintiff's costs upon issues on which he has not succeeded are taken away, and the costs of the issues found for the defendant are directed to be deducted from the plaintiff's costs. Under this rule, the plaintiff cannot claim the costs of the cause. The rule of Hilary term, 4 W. 4, r. 7, directs, that, in the case of several issues, a verdict and judgment shall pass at the trial against either party in respect of the issues which he has failed to establish, and that he shall be liable to the other party in respect of all costs occasioned by such issues. Under this rule, the defendant can only claim the costs of the issues found for him at the trial." [V. WILLIAMS, J. My brother ERLE means to say, that, where the judgment is partially for the plaintiff, the case is not within the 23 H. 8, c. 15, s. 1.] Clearly that is not correct. The defendant is entitled to the costs of the cause where he succeeds upon any issue that wholly defeats the plaintiff's claim. [WILDE, C. J. Your contention is, that, but for the introduction of the second count, the defendant would have had a judgment upon the whole record; and that the plaintiff is not to be placed in a better situation by having put upon the record a bad count.] Precisely so. *Day v. Hanks*, 3 T. R. 654, *Thornton v. Williamson*, 13 East, 191, and *Cross v. Johnson*, 9 B. & C. 618, 4 M. & R. 290, are also authorities to show that the defendant is entitled to the *502] general costs of the cause, *notwithstanding he has not succeeded upon the entire record.

The plaintiff would only be entitled to the costs of the witnesses who were called *exclusively* in support of those issues upon which he succeeded at the trial: *Lardner v. Dick*, 2 Cr. & M. 389, 4 Tyrwh. 239, 2 Dowl. P. C. 333; *Knight v. Woore*, 3 N. C. 534, 4 Scott, 360, 5 Dowl. P. C. 487; *Crowther v. Elwall*, 4 M. & W. 71.(a) Here, the plaintiff would have incurred all these costs in endeavouring to support the second count; and neither party is entitled to the costs of the issue thereon: *Goodburne v. Bowman*, 9 Bing. 667, 3 M. & Scott, 69, 2 Dowl. P. C. 206

The allowance for the two copies of the deed of settlement,—which the defendant had notice to produce, and to prove which the plaintiff had subpoenaed a clerk of the company,—was entirely discretionary with the master.

Talfourd, Serjt., in support of his rule. The defendant clearly is not entitled, under the 23 H. 8, c. 15, s. 1, to the general costs of the cause, where he can have no entire judgment. Had he pleaded to the first count as he did, and demurred to the second, as he should have done, no doubt he would, by virtue of the 23 H. 8, c. 15, and the 8 & 9 W. 3, c. 11, s. 2, have been entitled to the general costs. But having abstained from demurring to the bad count, he very properly incurs the penalty of paying his own costs. *James v. Brook* is precisely in point.

The plaintiff was clearly entitled to the costs of the issues found for

(a) And see Archbold's Practice, 8th ed., by Chitty, 1381.

him at the trial, notwithstanding the judgment was arrested. The infirmity of the count does not relieve the defendant from the payment of costs occasioned by his false plea.

*The allowance for the copies of the deed of settlement was excessive. The whole deed need not have been copied; and, at all events, two copies were unnecessary. [**503* *Cur. adv. vult.*]

WILDE, C. J., now delivered the opinion of the court.

The plaintiff declared against the defendant, as secretary of The Church of England Life and Fire Assurance Trust and Annuity Company, in two counts, on two different contracts to employ him as attorney and solicitor to the company. There were also counts for work and labour, and on an account stated.

The defendant pleaded to the whole declaration, that the company did not promise; and a special plea to the first and second counts respectively, justifying the discharge of the plaintiff,—to which there was a replication *de injuriâ*; and to the third and fourth counts the defendant pleaded payment in satisfaction.

At the trial, a verdict was found for the plaintiff on the issues joined on the pleas to the first and second counts, subject to a motion to enter a verdict for the defendant on the issue on non assumpsit as to the first count; and the verdict was for the defendant on the general issue as to the third and fourth counts, and for the plaintiff on the special pleas.

A rule nisi was afterwards obtained by the defendant, to enter a verdict for the defendant on the plea of non assumpsit to the first count, and to arrest the judgment on the second count; which rule was, after argument, made absolute.

The master, on taxation of costs, allowed to the defendant the general costs of the cause, and allowed as part of them the costs of two copies of the deed of settlement, which was very long. He also refused to allow the plaintiff the costs of certain witnesses called by him *in support of the issue on the special plea to the first count, on which he succeeded, because their evidence was applicable to other issues also. [**504*]

A rule nisi for reviewing the master's taxation was granted, and these points were fully discussed. As to the first,—which was the most important,—it was contended that the right of the defendant to costs depended upon the statute 23 H. 8, c. 15, (extended to all actions by the 4 Jac. 1, c. 8,) which enacted, that, in certain actions, “if the plaintiff, after appearance of the defendant, be nonsuited, or that *any* verdict happen to pass by lawful trial against the plaintiff, the defendant in every such action shall have judgment to recover his costs against the plaintiff, to be assessed and taxed at the discretion of the court,” &c.; and that this statute did not entitle the defendant to costs, unless the verdict was in his favour *on the whole record*: whereas, in this case, the verdict was in favour of the plaintiff on both the issues raised as to the second count, upon which the judgment was arrested. The case of *James v. Brook*,

decided by ERLE, J.; in the Bail Court, as reported in the Law Journal,^(a) is certainly expressly in point: and, if that was rightly decided, this rule should be made absolute. But, after mature consideration, it appears to us that the statute of 23 H. 8, c. 15, as construed in several cases, applies, although the defendant cannot have a verdict in his favour on every part of the record. Thus, in *Day v. Hanks*, 3 T. R. 654, in which the declaration contained two counts in case for disturbances in two distinct commons, and as to the first the defendant suffered judgment by default, and as to the second, took issue, and obtained a verdict,—the court held, that, as to that, the defendant was entitled to judgment and his costs, although he could not have a *verdict and judgment on every part of the record. And in *Thornton v. Williamson*,—an action of trespass *quare clausum fregit*,—the defendant pleaded two different rights of way, upon which the plaintiff took issue, and new-assigned *extra viam*, as to which the defendant suffered judgment by default; at the trial, damages were assessed on that judgment: the plaintiff obtained a verdict on the issue as to one right of way, and the defendant, on the issue as to the other: and it was held, that the defendant was entitled to the general costs of the cause, although it was manifest that he had not a general verdict in his favour, nor could he have judgment on every part of the record. *Cross v. Johnson* is to the same effect.

The attention of Mr. Justice ERLE does not appear to have been drawn to these cases, by the counsel who argued *James v. Brook*. It was assumed that the statute, 23 H. 8, c. 15, did not give the defendant costs in such a case; and the question was treated as depending upon the new rules as to the allowance of costs upon particular issues found for plaintiff and defendant. But we think that the statute *does* apply to this case, which differs from those only in the circumstance—that, as to the second count, the plaintiff obtained a verdict, and judgment was arrested: but it seems difficult to say upon what principle a plaintiff is to be in a better position where he has obtained a verdict on an issue joined on a count so defective that he can have no judgment, than where he has judgment by default on a good count, as in *Day v. Hanks*.^(b) As far as costs are concerned, the count on which judgment was arrested, is removed out of the way: there is no effective verdict where judgment is arrested: and, although it may be true that the defendant cannot have judgment on every part of the *record; yet, upon the whole record, the judgment is in his favour; and we think the master was right in allowing him the general costs of the cause.

As to the issues found for the plaintiff on pleas to the first, third, and fourth counts, the master would not allow the costs of his witnesses, because they were not exclusively applicable to those issues. The master

(a) 16 Law Journ., N. S., Q. B. 168.

(b) And see *Huddy and Fisher's case*, 1 Leon 278.

was the proper party to judge whether the evidence of the witnesses was exclusively applicable to the issues found for the plaintiff; and, as he decided that it was not, the plaintiff, not being entitled to the general costs of the cause, was not entitled to have the costs of those witnesses allowed, according to several decisions: *Lardner v. Dick*, 2 Cr. & M. 389, 2 Dowl. P. C. 833; *Knight v. Woore*, 3 N. C. 584, 4 Scott, 360, 5 Dowl. P. C. 487; *Crowther v. Elwell*, 4 M. & W. 71.

The remaining point, viz. the allowance of the copies of the deed, we think was a matter in the discretion of the master; and we see no reason for saying that the manner in which he has exercised that discretion is in contravention of any rule of law, or the practice of the court.

The rule for reviewing the master's taxation, must, therefore be discharged. Rule discharged.

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*Ex parte THOMAS KINNING. June 4. [*507

Where, under the 8 & 9 Vict. c. 127, s. 1, the judge of an inferior court of record has, upon proof of the ability of the party, made an order *simpliciter* for the payment of a debt by instalments, he cannot, after default made, grant a warrant of imprisonment without giving the debtor an opportunity of being heard against the granting of such warrant.

Semle, (by Cresswell, J.,) that, under this statute, an order of commitment upon non-payment cannot be embodied in the original order to pay.

Whether there is jurisdiction under this statute to commit when the defendant is not resident within the district, *quere*.

THOMAS KINNING was arrested on the 27th of April by virtue of the following warrant of commitment, under which he was detained in the custody of the keeper of the debtors' prison for London and Middlesex in the city of London:—

“London to wit.

“In the sheriff's court, London, Poultry Compter, an inferior court of record for the recovery of debts.

“At a court holden the 4th day of February, 1847, at the Guildhall of the city of London, and within the jurisdiction of this court:

“Whereas, Thomas Kinning, of Fleet Lane, Farringdon Street, in the city of London, on the 7th day of December last, being indebted to William Townley, of 8 Little James Street, Gray's Inn Lane, in the county of Middlesex, in a sum not exceeding 20*l.*, besides costs of suit, that is to say, in the sum of 19*l.* 19*s.* besides 8*l.* 12*s.* 6*d.*, costs of suit, by force of the judgment hereinafter mentioned, and *then being at Fleet Lane*, in the city aforesaid, and within the jurisdiction of this court, was *duly* summoned to appear on the 12th day of December last, at this court, to answer such questions as might be put to him touching the not having paid to the said William Townley the sum of money recovered in a certain judgment of this court on the 5th day of December, 1846; and the said Thomas Kinning having *appeared before me at

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the time and place aforesaid; and it thereupon then and there appearing to me, by the admission of the said Thomas Kinning, that the said Thomas Kinning had the means of paying the said debt and costs aforesaid in manner hereinafter mentioned, I did then and there order that the said Thomas Kinning should pay the debt and costs aforesaid to the said William Townley, in manner following; that is to say, the sum of 2*l.*, part thereof, on the 12th day of January then next, and the residue thereof by instalments, on the 12th day of every subsequent month, until the said debts and costs were fully paid: And whereas, it has this day, at this court, been duly proved before me that the said Thomas Kinning has not paid 2*l.*, the amount of the first instalment, as directed by the said order, although the time for the payment thereof has elapsed, and the same has been duly demanded of the said Thomas Kinning, and the said Thomas Kinning has been personally served with a copy of the said order, and the original order was at the same time shown to him; but that 2*l.*, being the amount of the said first instalment, is still due and owing and unpaid to the said William Townley, contrary to the tenor and effect of the said order: These are, therefore, to will, require, and authorize you, immediately upon the receipt hereof, or so soon after as may be, to take into your custody the body of the said Thomas Kinning, and him safely to convey to Her Majesty's debtors' prison for London and Middlesex, in the city of London,—being the common jail wherein the debtors under judgment and in execution, of the superior courts of justice, may be confined within the city of London, being the city in which the said Thomas Kinning *hath been resident*,—and there to deliver him to the keeper of the said prison; who is hereby required and authorized to receive the said Thomas Kinning into his custody, and him *509] safely to keep and detain in the said prison, *for the space of forty days from the time of his arrest under this warrant, or until he shall be discharged out of custody by leave of me. And for so doing, this shall be your sufficient warrant.

“Given under my hand and seal, at the said court holden at the Guildhall aforesaid, this 4th day of February, 1847.

(Signed)

“EDWARD BULLOCK,

“Barrister-at-law, and judge of the said court.

“To Lloyd Simpson, sergeant-at-mace, and to Thomas

Burdon, keeper of the debtors' prison aforesaid, or his deputy there.”

Pashley, on a former day, obtained a *habeas corpus* to bring up Kinning to be discharged from custody, on the ground that the warrant of commitment had been made without jurisdiction, and that it was defective in form.

The return having been read, *Pashley* now proceeded to state his objections.

The question arises upon the 1st, 3d, and 4th sections of the 8 & 9 Vict. c. 127.. The 1st section enacts, "that if any person is or shall be indebted to any other in a sum not exceeding 20*l.* besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any court, which judgment or order shall have been obtained from any court of competent jurisdiction in England,(a) it shall *be lawful for the creditor so having obtained a judgment or order, to obtain a summons from any commissioner of the court of bankruptcy for the district in which such debtor *shall reside or be*, or from any court of requests or conscience, or inferior court of record for the recovery of debts, or other court for the recovery of small debts, within the jurisdiction of which such debtor *shall reside or be*, having a judge who shall be either a barrister at law, special pleader, or an attorney who shall have practised as an attorney for not less than ten years in one of her majesty's superior courts of common law at Westminster,—which summons such commissioner of the court of bankruptcy, or such court, shall be authorized and required to grant, according to the form in schedule A.(b) hereunto annexed,—upon the application of such creditor by petition or note in writing according to the form in schedule B. hereunto annexed; and the debtor, appearing before such commissioner or court at the time to be appointed in such summons, shall be examined by the said commissioner or court, and shall, if the creditor think fit, be interrogated before such commissioner or court, by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, *the property, or means of payment, he still hath or may have*, the disposal *he may have made of any property since contracting such debt; and such creditor shall also, if such commissioner or court shall think fit, be examined by the said commissioner or court, touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such commissioner or court by the said debtor touching the said claim against him; and it shall be lawful for such commissioner or court to make an order on the said debtor, for the payment of his debt by instalments or otherwise; and, in case such debtor

(a) Here the power, given to the commissioner or the inferior court, extends to all judgments or orders, whereas the power to proceed by way of judgment-summons under the new county-courts act, (9 & 10 Vict. c. 95,) ss. 99, 100, is confined to judgments or orders of some court constituted or destroyed by the act. Where, therefore, a creditor wishes to proceed in a new county-court upon a judgment recovered in any other inferior court, or in any superior court, the course is to take out the ordinary ten days summons in an action of debt upon the judgment. So, upon all judgments where process is issued into the district of another judge.

(b) The form of the summons is—

"You are hereby required to appear before [set forth the court's style,] at — on the — day of — next, to answer such questions as may be put to you touching the not having paid to A. B. of — the sum of £—; recovered in a certain judgment [or order] of [set forth the style or other sufficient description of the court that gave the judgment, or made the order.]

"To C. D. of —.

"By order of the court.

(Signed) "——."

shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, or shall appear to such commissioner or court, to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed, or made away with, his property in order to defeat his creditors, or, *if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made*, then, in any of the said cases, it shall be lawful for such commissioner, or the judge of such court, to order such debtor to be committed, for any time not exceeding forty days, to the common jail wherein the debtors under judgment and in execution of the superior courts of justice, may be confined within the county, city, borough, or place *in which such debtor shall be resident*,"(a) &c. The 3d

(a) The 8 & 9 Vict. c. 127, s. 1, gives the power of imprisonment in seven cases: first where the debtor when summoned does not attend; secondly, if he refuses to disclose his property or his transactions; thirdly, if his answers are unsatisfactory; fourthly, if he has contracted the debt fraudulently; fifthly, if he has contracted the debt without reasonable prospect of being able to pay; sixthly, if he has concealed or made away with his property; seventhly, if having the means of payment by instalments or otherwise, he is able and has been ordered so to pay and has not paid.

The question in the principal case arose upon the last of these provisions. The warrant shows that on the 12th of December it appeared to the judge that Kinning had the means of paying the 19*l.* 19*s.* debt, and 3*l.* 12*s.* 6*d.* costs, by instalments of 2*l.* per month; and that on the 4th of February the judge, upon its being "duly proved" before him that Kinning had not paid the first instalment which became due on the 12th of January, and without proof or inquiry as to the continuing ability of Kinning, made an order for his imprisonment for forty days. For the purpose of determining whether this order was legal, it was not necessary to look further than the last or seventh ground for imprisonment. No examination took place after the 12th of December, and no default of any kind is alleged against the defendant until the 12th of January. This allegation of default the debtor had no opportunity of denying or of excusing. If any of the first six grounds for committal had occurred before the 12th of December, the judge might have made an absolute order for immediate imprisonment. Whether, where the judge has the power of committing absolutely, he has also the power of making a qualified order of commitment, defeasible upon payment of what is justly due, is a question to which the decision in *Kinning, ex parte*, does not appear to apply. If imprisonment took place upon the non-payment of an instalment, such imprisonment would be enforced, in respect, not of the non-payment—as to which the party might have a valid answer—but of the conditionally and imperfectly condoned prior act of misconduct.

Since the decision of this court in *Kinning's case*, many of the new county-courts, acting under the 9 & 10 Vict. c. 95, ss. 98, 99, 101,—the provisions of which, it will be seen, are nearly the same as those of the 8 & 9 Vict. c. 127,—have discontinued in all cases the practice of making orders for the payment of money by instalments with a committal in case of non-payment. But under the first six clauses of the 98th section of the 9 & 10 Vict. c. 95, and under the seventh, where the debtor, being of ability to pay, has withheld payment *before* he is summoned, there is a clear power to commit absolutely; and where such a power exists, there appears to be nothing in the decision in *Kinning's case* which shows that the judge may not mitigate the sentence, and allow the debtor to atone for his past misconduct by satisfying the creditor. If there is no power to do this, the difficulty cannot, it is conceived, be evaded by directing an immediate warrant of commitment to lie some days in the office.

*section declares and enacts "that no imprisonment under this act shall in anywise operate as satisfaction or extinguishment of any debt or demand; but any person *imprisoned under this act, who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the *order of imprisonment being made, and all subsequent costs, shall, (a) upon entry of such payment endorsed on the order of imprisonment, signed by the plaintiff or his attorney, be discharged out of custody *by leave* (a) of a commissioner or judge of the court in which the order of imprisonment was made." And the 4th section enacts "that the judge of every court of requests or conscience, and of every inferior court of record for the recovery of debts, and of every

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By the 9 & 10 Vict. c. 95, s. 98, "it shall be lawful for any person who has obtained any unsatisfied judgment or order in any court—held by virtue of this act, or under any act repealed by this act,—for the payment of any debt, or damages, or costs, to obtain a summons from any county-court within the limits of which any other party shall then dwell or carry on his business, such summons to be in such form as shall be directed by the rules made for regulating the practice of the county-courts as herein provided, (see Schedule to Rules of Practice, No. 32,) and to be served personally upon the person to whom it is directed, requiring him to appear at such time as shall be directed by the said rules (three clear days before the appearance day, by Rule 38) to answer such things as are named (*sic*) in such summons; and if he shall appear in pursuance of such summons, he may be examined, upon oath, touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which is the subject of the action in which judgment has been obtained against him, and as to the means and expectation he then had, and as to the property and means he still hath, of discharging the said debt or damages or liability, and as to the disposal he may have made of any property."

By s. 99, "if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or (secondly) shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or (thirdly) if he shall not make answer touching the same to the satisfaction of such judge, or (fourthly) if it shall appear to such judge, either upon the examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or (fifthly) has wilfully contracted such debt or liability without having had, at the same time, a reasonable expectation of being able to pay or discharge the same, or (sixthly) shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same with intent to defraud his creditors or some of them; or (seventhly) if it shall appear to the satisfaction of the judge of the said court, that the party summoned has then or has had since the judgment obtained against him, sufficient means or ability to pay the debt, or damages, or costs so recovered against him, either altogether (meaning probably 'in one sum') or by any instalment or instalments which the court in which the judgment was obtained shall have ordered; and if he shall refuse or neglect to pay the same, as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common jail, or house of correction, of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days."

And by s. 101, "where the defendant in any suit brought in any county-court, shall have been personally served with the summons to appear, or shall personally appear at the trial of the same, the judge, at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other parties touching the several things hereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained, in case the plaintiff had obtained a summons for that purpose, after the judgment obtained."

(a) There appears to be some ambiguity in this clause.

other court for the recovery of small debts, of which the judge is a barrister at law, or special pleader, or an attorney of ten years' standing of one of her majesty's superior courts of common law at Westminster, in which court proceedings shall be had for the recovery of any debt or *515] demand within the jurisdiction of the said court, shall have the like powers, in the suit instituted for recovery of such debt or demand, of examining the parties to the suit, and, upon occasion of pronouncing judgment therein, if judgment be given for the plaintiff, shall have the like powers of further examining the parties, and, in the several cases hereinbefore specified, of committing the defendant to prison, which he might exercise (have exercised) under the provision hereinbefore contained, if judgment for such debt or demand had been obtained in his court, and the judgment-creditor had obtained a summons for such defendant from the same court under the act; and all the provisions of this act shall be deemed to apply to such case as if such summons had been obtained."

In a case of this sort, where the proceeding is not according to the course of the common law, the jurisdiction ought to appear in express and unequivocal terms, or by necessary inference: *Rex v. Eyre*, 2 Stra. 1067; *Rex v. Dugger*, 5 B. & Ald. 791; *Christie v. Unwin*, 11 Ad. & E. 373, 3 P. & D. 204; *Brancker v. Molyneux*, 4 M. & G. 226, 4 Scott, N. R. 753. The jurisdiction is not given to every court of record, but only to those courts in which a barrister or a special pleader, or an attorney of a certain standing, is the judge. It is not shown in the principal case, that the judge was a barrister, pleader, or attorney, at the time of the original application. It is not stated what character Mr. Bullock filled at the time, or where it was that the appearance took place. The words of the warrant "at the time and place aforesaid," may refer to any one of the three periods, and to any one of the three places, which are mentioned in the preceding parts of the warrant. [COLTMAN, J. According to the usual rule of construction, the reference should be taken to be *the last antecedent viz., the 5th of December.]

*516] Either that is the date referred to, or the reference is ambiguous. The old authorities were cited and recognised in *Rex v. Wright*, 1 A. & E. 434, 3 N. & M. 892. To the cases there cited may be added, 2 H. 7, 10 b, (M. 2 H. 7, fo. 10, pl. 6;) 2 Hale, P. C. 180.

It is not stated in the warrant, that the defendant appeared at a place at which he had been summoned to appear, or that he appeared in pursuance of any summons. He may have been present accidentally, or have attended as a witness. [MAULE, J. A summons would be necessary where the judgment had been obtained in another court; but, where the judge is proceeding upon a judgment of the same court, no process can be necessary to bring the defendant into court, as he is there already.]

Magistrates have no jurisdiction to make an order of removal until an application has been made by the overseers. In *Weston-Rivers v. St.*

Peter's, in *Marlborough*, 2 Salk. 492, 493,(a) HOLT, C. J., says, "A complaint *ex officio* (b) from one not concerned, is nothing; it may be the parish are willing to keep him." This is cited and recognised by LITTLEDALE, J., in *The Queen v. Colbeck*, 12 A. & E. 161. Here, no application by the original creditor is shown. [WILDE, C. J., referred to the case of *Basten v. Carew*, 3 B. & C. 649, 5 D. & R. 558, where the record of the proceedings of two magistrates who had turned a tenant out of possession under the 11 G. 2, c. 19, s. 16, was held to be sufficient, though it did not appear that they had acted on the oath of the landlord. CRESSWELL, J. If there was a power to make an original order of commitment, that has not been done.] In the case of *Dempster v. Purnell*, 3 M. & G. 375, 4 Scott, N. R. 30, *TINDAL, C. J., [*517 says: "I take the rule to be well established, by the cases of [*Moravia v. Sloper*, Willes, 80, and *Titley v. Foxall*, Willes, 688, that, where it appears, upon the face of the proceedings, that the inferior court has jurisdiction, every intendment will be made in order to support them; but that, if it do not so appear, or if the point, whether or not the inferior court has jurisdiction, be left in doubt, no such intendment will be made." The warrant here, though it states that Edward Bullock, the judge of the court, was a barrister on the 4th of February, 1847, does not show that he was so qualified at the time the proceedings originated.

It does not appear that this party was summoned to show cause why he should not be committed for disobedience of the order, or that he had any notice of an intention so to proceed against him; a fatal omission according to the principle laid down in *The Queen v. Templeman*, 1 Salk. 55; *The Queen v. Simpson*, 10 Mod. 248, 341, 378; *The King v. Benn*, 6 T. R. 198; *Capel v. Child*, 2 Cr. & J. 558, 2 Tyrwh. 689; *The Queen v. Smith*, 5 Q. B. 614; and the more so as imprisonment under this act does not operate as a satisfaction or extinguishment of the debt, but is strictly and solely penal. The necessity of such summons, in the case of any one to be affected by an intended judicial proceeding, is frequently laid down. In *The King v. Benn*, the court thought the issuing of a warrant of distress, not grounded on a previous summons, contrary to the first principles of justice, and wholly illegal. In *Harper v. Carr*, 7 T. R. 270, the same rule was acted on, the court saying, that on summoning the party, "many circumstances may appear to show that a warrant of distress ought not to be granted." There are numerous recent instances of the judicial adoption of the same *principle. *Painter v. Liverpool Gas Company*, 3 A. & E. 423; [*Rex v. Wilson*, 3 A. & E. 826; *The Queen v. Smith*, clerk, [*518 5 Q. B. 614, and *Bruce v. Wait*, 1 M. & G. 1, 1 Scott, N. R. 81.

(a) S. C. Lord Holt, 510; S. C. *per nom. Wootton-Rivers v. St. Peter's, Marlborough*, 3 Salk. 54; S. C. *per nom. R. v. Wootton-Rivers*, 5 Mod. 149.

(b) Meaning, as it may be inferred from the report in 5 Mod., a complaint not made by the parish officers—an *extra-official* complaint.

[MAULE, J. The same principle was, I think, applied, a few years ago, even in the case of a bishop, who had issued, to a vicar, without previous summons or hearing, a requisition to nominate a curate with a stipend.] That was done in the case of the Bishop of London, reported as *Capel v. Child*, in which BAYLEY, B., says,^(a) that he “knew of no case in which you can have a judicial proceeding by which a man is to be deprived of any portion of his property, without having an opportunity of being heard.” Here, in a case of personal liberty, the principle applies the more strongly. The decision should not have taken place in his absence. The *dictum* of ALDERSON, B., in *Ex parte Foulkes*, 15 Law Journ., N. S., Exch. 300, that the intention of the act was, to give a *limited ca. sa.*, was repudiated by PATTESON, J., upon an application made yesterday to the Court of Queen’s Bench by this party for the relief now sought.^(b) Upon that occasion, two questions were raised—first, that the debtor was entitled to be summoned to show cause why he should not be committed—secondly, that it did not appear upon the face of the warrant that the debtor was resident within the jurisdiction at the time of the commitment. Upon the first point, Lord DENMAN, C. J., and ERLE, J., were of opinion that the debtor was not, PATTESON, J., and COLERIDGE, J., that he was, entitled to be heard before a commitment. Upon the second point the whole court, with the exception of PATTESON, J., held that the residence sufficiently appeared,—Lord DENMAN, however, expressing himself upon this point with doubt and hesitation. The statute requires *519] the *judge to inquire into the debtor’s ability, and to exercise a discretion as to the period of imprisonment; how is this to be done behind the back of the party who probably can alone give such information as will enable the judge to form an opinion upon the subject?

The warrant is further defective, inasmuch as it does not show upon the face of it, that Kinning was, at the time of the order of his commitment, *resident* within the district of the jail to which he was committed: *The King v. The Inhabitants of North Curry*, 4 B. & C. 953, *Withorn*, app., *Thomas*, resp., 7 M. & G. 1, 8 Scott, N. R. 783. It is true, he is described as “of Fleet Lane, Farringdon Street, in the city of London,” on the 7th of December, 1847, the date of the summons, and as *then being* within the jurisdiction of the inferior court: but his *continued* residence there is not to be inferred: *Nepean v. Doe d. Knight*, 2 M. & W. 894. The summons must be in writing, and in the form given by the statute. [WILDE, C. J. He is alleged to have been *duly* summoned. In *Rex v. Croke*, Cowp. 26, where a statute required a certain notice to be in writing, an order of sessions stating that *due* notice had been given to the party, was held insufficient. But, in *Rex v. Mozely Woolf*, 1 Chitt. Rep. 401, the insertion of the word “duly” by ABBOTT, C. J., prevented the judgment

(a) 2 C. & J. 579.

(b) 16 Law Journ., N. S., Q. B. 257.

from being reversed on error.(a) So, it is enough to allege that a *fiat* in bankruptcy *duly* issued, without setting out all the necessary preliminaries.] He also cited *The Duke of Norfolk's case*, M. 39 H. 6, fo. 2, pl. 45, the resolution of the Chancellor(b) in T. 9 E. 4, fo. 14, pl. 9; *Rex v. Campion*, 1 Siderf. 14; *Serjt. Whitacre's case*, 2 Salk. 484; *Rex et Reg. (or The City of Exeter) v. Glide*, 4 Mod. 38, 12 Mod. 27, 251, 1 Shower, Comberb. 197, Lord Holt, 169, 364, 435. He [*520 adverted also to the strange allusion made by FORTESCUE, J.,(c) to the second chapter of the Book of Genesis, ver. 9, &c., in *Dr. Bentley's case*, 1 Stra. 557, 8 Mod. 148; *Christie v. Unwin*, 11 A. & E. 373; *Calder v. Halket*, 8 Moore's Priv. Council Cases, 28.

Petersdorff, contrà. The argument in support of the defendant's discharge proceeds upon the assumption that this is a penal, and not a remedial, process. By the old law, a creditor who had obtained a judgment, had an unlimited power of imprisoning his debtor. Here, there is a mitigated power of commitment. There is a strict analogy between the proceeding under this act and that under the 1 & 2 Vict. c. 110, s. 3, to arrest a defendant who is about to quit England, under which the *capias* issues upon an *ex parte* application. [WILDE, C. J. There is one remarkable difference. Under this act, the commitment is for a certain time, and subject to a certain contingency, at the discretion of the judge. There may, therefore, be good reason why the party should be put in a position to show the circumstances that gave rise to the default.] Under the 1 & 2 Vict. c. 110, the judge has a discretion to exercise as to granting the *capias* at all, and as to the amount for which the defendant shall be held to bail. [MAULE, J. Under that act the judge has, in terms, power to proceed *ex parte*. The application supposes that the party is on the eve of departing from the country. The proceeding would be rendered nugatory, if previous notice to him were required. Some inquiry is clearly necessary here, as to the debtor's means at the time the *payment becomes due; whether that is to be *ex parte*, or upon summons, [*521 is the question.] Here it would be equally nugatory. [WILDE, C. J. It is difficult to say how the judge is to exercise a discretion as to the debtor's ability to pay, if the debtor, who alone may have the means of giving the requisite information is not to be heard.] The act does not direct the judge to inquire into the circumstances of the debtor at different periods.(d) There appears to be no provision for an inquiry at each time the debtor appears. After the first examination, the functions of

(a) There is no report of any proceedings in error, the amendment having obviated the objection to the verdict grounded on the separation of the jury.

(b) R. Stillington, Bishop of Bath and Wells.

(c) 1 Stra. 567, 8 Mod. 164. And see Fortescue's Rep. 206, 207.

(d) But under the new county-courts act, 9 & 10 Vict. c. 95, s. 105, the judge may, in case of inability to pay on the part of the debtor, suspend or stay execution upon a judgment pronounced, or order made, by such judge.

the judge are ministerial. [COLTMAN, J. How often might a man be committed to prison in case of non-payment? The imprisonment does not discharge the debt; it is merely penal.] The party may be discharged by leave of the commissioner or judge. [MAULE, J. You say that there is no hardship, because a power is given to apply to the commissioner or court for a discharge. There may be a general power of granting relief. You admit that some further inquiry must precede the awarding a warrant of commitment.] Yes. The observation of ALDERSON, B., in *Foulkes, ex parte*,—that the intention of the act was, to give a limited *ca. sa.*,—is well founded. [MAULE, J. That *dictum* may be very true; but, like many that are true, it is not very useful. The question is as to the extent of the limitation. The limitation may be such as to include or to exclude this case.] None of the authorities cited shows any necessity for a previous summons. *Regina v. Bentley* was a case of mandamus. [*Pashley*. In *Painter v. The Liverpool Gas Company*, 3 A. & E. 433, 6 N. & M. 736, 2 Harr. & W. 233, a warrant *522] of distress issued by a magistrate *under a local act for neglecting to pay gas-rent after demand, without a previous summons and hearing, was held to be illegal, though the act was silent as to any summons or hearing. That was the case of an action, and not a mandamus.] [*Petersdorff* was then proceeding to argue the objection as to the residence, when the court intimated that they had a clear opinion against him on the first point.]

WILDE, C. J. Being informed of the difference of opinion that has existed between very learned persons in another court, upon the true construction to be put upon this statute, we have given the subject our most anxious consideration; and the unanimous result at which we have arrived is, that the return to this writ of *habeas corpus* is insufficient to warrant the detention of the party, and consequently that he must be discharged.

The statute in question is, to a considerable extent, penal. It gives a power of awarding imprisonment that is not to operate as satisfaction or extinguishment of the debt. In the ordinary case of a defendant taken in execution on a *ca. sa.*, the imprisonment is a satisfaction (a) of the debt or damages. Here, however, the power to incarcerate the debtor is simply used by way of coercion; and the party is to be subjected to an imprisonment not exceeding forty days, but varying, within that limit, according to the circumstances of each particular case. By the 1st section of the act, it is enacted that a party having a sum not exceeding 20*l.*, besides costs, due to him by virtue of any judgment or *523] order for the payment of money or costs, may summon his *debtor before a commissioner of bankrupt, or a judge of cer-

(a) This is a strong form of expression which appears to have been adopted by the courts for the purpose of indicating that, at common law, the judgment-creditor, by imprisoning his debtor, is barred of all other remedy against him.

tain inferior courts. Upon the appearance of the debtor, certain matters are to be inquired into, one of which is as to the property or means of payment possessed by the debtor; and a discretion is given to the commissioner or judge as to the time and mode of payment, having regard to the apparent means of the party. The statute also gives power to the commissioner or judge to commit the debtor to prison, for any time not exceeding forty days, in certain cases, viz., where he shall, without sufficient excuse, neglect to attend the summons, or refuse to disclose his property, or to answer the interrogatories put to him; or shall appear to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it; or of having concealed or made away with his property, in order to defeat his creditors; or, if he appears to have the means of paying the debt by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order.^(a) The object of the act is, to give the creditor an additional remedy against the person of his debtor, with the view to the punishment of fraud. It deals only with the person, leaving the creditor to his remedies against the property of the debtor. The general purview of the act is opposed to the inhumanity of sending a man to prison for not paying where he has no means of payment, but it reserves a power of punishing for fraud and misconduct. Where there are no present means of payment, the commissioner or judge is authorized to give time; and, if the payments ordered to be made are not made at the time appointed, the commissioner, or the judge of the inferior court is authorized to commit for not exceeding forty days. *The learned judge in this case seems to have thought the inquiry as to the debtor's ability to pay by instalments or otherwise, was limited to an inquiry, to be made at the time of making the order, as to his probable future means of payment. Of course it is necessary, at the outset, for the judge to inquire into the present circumstances of the party, and his probable future means. But the future means must always be, to a certain degree, matter of speculation: and it is obvious that it must be equally material to ascertain his ability when the day appointed for payment has arrived. If time be granted, with reference to what object is it granted? With reference, no doubt, to the probable means of the debtor at the time mentioned. Is there to be any other inquiry into the means of the debtor, when he fails to pay at the time mentioned in the order? What is to regulate the judge's discretion in exercising the power to commit? Can it be doubted that the party's means of payment must be one of the essential points of inquiry? Is it reasonable to entertain an inquiry without giving the debtor himself, who alone may have knowledge on the subject, an opportunity of being heard? Many circumstances might arise to occasion the disobedience of the order, such as losses, disappointments,

(a) Vide infra, 527 (a).

or bodily ailments: of all these matters of excuse, the creditor may be ignorant; but they are essential to be inquired into, to regulate the discretion of the judge. When, therefore, the statute distinctly points to an inquiry of some sort, it seems to follow that the mode of inquiry is to be regulated by general principles, and that the party so deeply interested in the result should be heard. There are certainly no words in the act pointing to an exclusion of the party from being heard. Common justice requires that the party most interested, and possessing the
 *525] best means of knowledge, should be *examined. The party should have notice of the steps intended to be taken against him. The statute pointing to a summons and hearing and examination in the first instance, and to an exercise of discretion on the part of the judge as to the length of imprisonment for a failure to obey the order; and seeing that it is based upon the idea that it is unjust to imprison a man merely because he is unable to pay; I think,—though with that doubt and hesitation which one necessarily must feel, in coming to a conclusion opposed to that of the Court of Queen's Bench,—that the safest course will be to hold that he is entitled to notice, and that there should be a summons when the creditor asks for a commitment; and consequently that the warrant in this case is defective, and the prisoner entitled to his discharge.

COLTMAN, J. I am of the same opinion. With all due deference to the learned persons who have entertained a contrary opinion, I cannot help thinking that this is a very clear case. The act to be done by the commissioner or other presiding officer of the inferior court, is a judicial, and not a ministerial act. It therefore follows, according to the rule laid down in *Harper v. Carr*, and in several other cases, that it can only take place after opportunity given for both sides to be heard. The only argument which has been suggested for a deviation from that universally acknowledged principle is, that it might be inconvenient to summon the defaulter, inasmuch as it might operate as a notice to him to abscond. But I do not think that that suggestion can with any propriety be applied to a case under this act, which is directed to the recovery of debts of trivial amount; whereas, it might be worth while for a party having notice that a *capias* under the 1 & 2 Vict. c. 110, is about to issue, to expedite that proceeding which it was the very object of that act to
 *526] frustrate. *Considering how highly penal are the provisions of this act, and that the imprisonment, how frequently soever repeated, operates as no satisfaction or extinguishment of the debt, it seems to me expedient that there should be no deviation from the ordinary principles which regulate the administration of justice; and that, in order to enable the judge to exercise a discretion, he ought to be made acquainted with all the circumstances of the case, which can only be done by an examination of the party himself.

MAULE, J. I also think, upon the substantial ground urged, that

this party is entitled to be discharged from custody. The proceeding is regulated by the 8 & 9 Vict. c. 127, s. 1, which gives power to a commissioner of the court of bankruptcy, or a judge of a court for the recovery of small debts, by a certain course, to enforce judgments pronounced in their own or in other courts, and contains provisions with reference to the punishment of a debtor who is guilty of fraud, or otherwise misconducts himself. Upon the appearance of the debtor before him, the commissioner or judge has power to examine him as to the circumstances under which the debt was contracted, and as to his means of paying it: and the statute provides, that, "in case such debtor shall not attend, as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court, or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, *or, if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same [*527 at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made, then, in any of the said cases, it shall be lawful for such commissioner, or the judge of such court, to order such debtor to be committed for any time not exceeding forty days," &c. The power to commit, it appears, is to be exercised only in cases of fraud or delinquency,—where the party has been guilty of a criminal omission to do something which he is morally bound to do, and which he is able to do. Where the party does not appear, he may be taken to be within one of these descriptions. The non-payment of a debt may be a misfortune or an act of delinquency; but it is an act of delinquency only in the event of the debtor being of ability to pay. The party under this act is not committed,—as under a *capias ad satisfaciendum*, which is only a mode of obtaining payment,—because he does not pay, but because he has been guilty of conduct meriting punishment.(a) The effect of the enactment is, that, if a man fraudulently omits to pay money when he ought to pay it, or commits some other fraud with reference to the debt, he may be punished by imprisonment for any period not exceeding forty days, at the discretion of the judge. The party is charged with misconduct admitting of aggravating or mitigating circumstances. Upon every principle of law and justice, it is right that the party should have an opportunity of being heard before this punishment is inflicted upon him,—as is said in *Dr. Bentley's case*, 1 Stra. 557, Fort. 202, 8 Mod. 148,

(a) In the case of an order for payment of a debt by instalments, the offence consists in not paying,—having the means of payment,—at the appointed time or times.

*528] 2Ld. Raym. 1884. *Capel v. Child*, 2 Tyrwh. 689, 2 Cr. & J. 558, *shows that the rule applies to the case of inquiries before ecclesiastical superiors. Is there, then, any thing in this case to take it out of a principle so generally established? It is sought to trace an analogy between the proceedings under this statute, and those under the 1 & 2 Vict. c. 110. Under that statute, however, it is to be observed, that the debtor is not committed in execution, but only until he finds bail; and the power to proceed *ex parte* is given in terms that leave no doubt. Besides, the act gives a power of appeal, of which the debtor may instantly avail himself, by applying to the court or to a judge,—a qualification which shows how watchful the legislature is, when conferring a power that is in derogation of the liberty of the subject. Under the 8 & 9 Vict. c. 127, no appeal is given: the party can only obtain his enlargement by payment of the debt, or by effluxion of time. It is conceded that there must be a second inquiry here, but it is insisted that it is an *ex parte* inquiry only. (a) The words of the act, however, being words that do not by any means exclude the defendant from being summoned and heard before the judge to show cause why he should not be committed, I think the general principle must prevail. Applying, therefore, the general principles of law which govern the administration of justice to the present case, it seems to me that the debtor is entitled to notice, and has a right to be heard, before he can be committed for disobedience of the order.

CRESSWELL, J. I am entirely of the same opinion. It is not necessary to say whether or not the judge has power, in the commencement, to direct the debtor to be imprisoned upon his failure to obey the order.

*529] Strong *arguments would readily suggest themselves against the validity of such a form of order. It is enough, however, to say that he has not done so here. I think it is impossible to say that the judge was not doing a judicial act; and therefore the debtor had a right to be present. The prisoner was discharged.

(a) The warrant does not show even an *ex parte* inquiry into the ability of the defendant to pay.

SHARLAND v. LEIFCHILD. May 26.

In assumpsit by vendee against vendor, for not delivering a proper abstract of title, the declaration alleged that the sale was subject to a condition, that the vendor should deliver an abstract of title to the purchaser; and assigned a breach, in the non-delivery of any abstract showing such a good and sufficient title as the plaintiff was, according to the condition, entitled to require to be shown.

Plea, that, at the time of the making of the promise, it was agreed, as part of the contract, that the defendant should deliver an abstract of his title, commencing with a deed of conveyance from A. to B., dated, &c., only, and should not be required to furnish any other abstract, or go into any previous title, &c.

Held, bad, on special demurrer, as an argumentative and circuitous denial of the contract stated in the declaration, and amounting to non assumpsit only.

ASSUMPSIT. The first count of the declaration stated, that the defendant put up for sale by public auction divers dwelling-houses, upon and subject to certain conditions of sale, and amongst others that the vendor would deliver an abstract of title to the purchaser, or his or her solicitor, who should examine the same with the original deeds at Chelmsford, and would execute, at the expense of the purchaser, a proper conveyance, &c.; that, at the sale, the plaintiff was declared, and it was agreed between him and the defendant that the plaintiff should become, the purchaser, subject to the said conditions. That, although a reasonable time had elapsed for the defendant's causing to be delivered to the plaintiff an abstract, showing such a good and sufficient title, as
 *according to the said conditions, the plaintiff was entitled to re- [530
 quire to be shown by the abstract therein mentioned as to be delivered by the vendor; yet the defendant had not caused to be delivered to the plaintiff, or any solicitor of the plaintiff, any abstract showing such a good and sufficient title to the dwelling-houses, as the plaintiff was, according to the said conditions, entitled to require to be shown by the abstract therein mentioned as to be delivered by the vendor; and that the defendant, after the making of the said agreement and promise, to wit, on, &c., delivered to the plaintiff,—as and for an abstract showing such a good and sufficient title to the dwelling-houses, as the plaintiff was, according to the said conditions, entitled to require to be shown by the abstract therein mentioned as to be delivered by the vendor,—an abstract which did not show such a good and sufficient title to the dwelling-houses, as, according to the said conditions of sale, the plaintiff was entitled to require to be shown by the abstract therein mentioned as to be delivered by the vendor, but which, on the contrary thereof, showed a less good and less sufficient title.

Plea—that, at the time of the making of the said promise, it was agreed between the plaintiff and the defendant, as part of the contract in the first count mentioned, that the defendant should duly deliver an abstract of his title to the dwelling-houses, commencing with a certain deed of conveyance from H. Bosanquet, Esq. to A. Markwick, dated the 24th of August, 1843, only, but that he the defendant should not be require to furnish any other abstract, and by no means to go into any previous title, or evidence thereof, notwithstanding the deeds or documents relating to the prior title might be mentioned, and covenanted to be produced, in any abstracted deed. Averment, that the defendant did, within a reasonable time in that behalf, *to wit, on the 10th
 of December, 1845, deliver to the plaintiff's solicitor an abstract [531
 of the defendant's title to the dwelling-houses, commencing with the said deed of conveyance, and which abstract showed a good and sufficient title in that behalf to the dwelling-houses, commencing with the said deed of conveyance.—Verification.

Special demurrer, assigning for causes, that the plea was an argumen-

tative traverse; that it ought to have concluded with a special traverse; that it improperly concluded with a verification; and that it amounted to the general issue.

Joinder in demurrer.

Peacock, (with whom was *T. Jones*,) in support of the demurrer. The plea is bad, as being an argumentative denial of a delivery by the vendor of such an abstract of title as mentioned in the declaration; and also as amounting to non assumpsit. The duty of the vendor to deliver an abstract showing a good title to convey, is a duty implied by law; *Souter v. Drake*, 5 B. & Ad. 992; *Doe d. Gray v. Stanion*, 1 M. & W. 695, Tyrwh. & Gr. 1065. Under the contract set out in the declaration, therefore, the plaintiff would have been bound to make out a good title. The plea does not admit the contract as alleged, viz. a contract to deliver an abstract showing a good title; but states the contract to be, to deliver an abstract commencing with a certain deed, excluding all evidence of any previous title. If that be so, the defendant has not entered into the contract charged in the declaration. In *Jones v. Nanney*, 1 M. & W. 838, Tyrwh. & Gr. 634, to assumpsit for the work and labour of the plaintiff as an attorney, the defendant pleaded, as to all but 90l., that *532] the work and labour was performed by the plaintiff *in endeavouring to secure the defendant's return to parliament on two occasions, under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements, and that no express contract was made between the plaintiff and defendant on the second occasion, and that 90l. was a fair remuneration for the plaintiff's services on that occasion; and the plea was held bad, on special demurrer, as amounting to the general issue. So, in *Whitaker v. Mason*, 2 N. C. 359, 2 Scott, 567, where to assumpsit upon a contract of sale of certain books to the defendant under certain special conditions set out in the declaration, the defendant pleaded in bar, that the books were sold to him upon the conditions set out in the declaration, but subject and according to the usage and course of dealing observed amongst booksellers in London, by which usage and course of dealing, as stated in the plea, a material variation was made in the terms of the contract declared on, concluding with a verification;—the court intimated an opinion that the plea would have been held bad, if specially demurred to, on the ground that it did not admit the promise, and excuse the non-performance of it, but, in effect, denied that the promise was ever made. So, here, the plea does not admit the promise, and excuse the non-performance of it; but, on the contrary, it sets up a contract materially varying from that alleged in the declaration. In *Brind v. Dale*, 2 M. & W. 775, in assumpsit against the defendant as a common carrier, to recover the value of goods delivered to him to be taken care of and safely carried by him, as such carrier, in his cart, from N. to B., and there safely delivered by him for the plaintiff, but which, through hi

negligence, were lost,—the defendant pleaded, that, when the defendant received the goods, an express condition and *agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do, by reason whereof, and not by reason of any negligence of the defendant, the goods were lost: and this plea was held bad, on special demurrer, as amounting to the general issue. And in *Nash v. Breeze*, 11 M. & W. 352, it is laid down, that, where a plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although, in truth, it only sets out what was the actual agreement between the parties. *Smart v. Hyde*, 8 M. & W. 723, will be relied upon in support of this plea. There, the declaration stated, that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised that she was sound, and averred as a breach that she was unsound. The defendant pleaded, that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were, that “a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the mean time a notice and certificate of unsoundness were given;” that the sale took place subject to the rules, and that the same were agreed to by the parties; and that such notice and certificate were not given within the time limited. The Court of Exchequer held that the plea was good, and did not amount to the general issue. [MAULE J.—That case may be sustained upon the ground that the plea admits the warranty and breach, but shows that the plaintiff is not to have his remedy, unless he has complied with the rules of the establishment.] PARKE, B., there says: “The plea admits the contract *and the promise, but shows it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o’clock at noon of the day next after the day of sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration; but, upon that point, I give no opinion. It is enough to say, that every word of this plea is consistent with the contract stated in the declaration.” [MAULE, J.—The court there seems to have relied on the fact of the rules of the repository not being embodied in the contract declared on. Here, however, the defence set up is part of the contract.] It is so alleged to be, in terms.

Couch, in support of the plea. *Smart v. Hyde* is a distinct authority to show that this plea is not bad for the cause assigned. There, as here, the agreement qualifying the contract declared on, and the contract itself, were alleged to have been made simultaneously. . ALDERSON, B., says: "The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract as alleged in the declaration." [CRESSWELL, J. I should take the meaning of the rules in that case to be, that, in the absence of a notice and certificate of unsoundness within the time limited, *535] it was to be taken conclusively between the parties that *the mare was sound. MAULE, J. The decision proceeds entirely on the ground that the rules were quite distinct from, and collateral to, the contract declared on.] So, here, the defendant sets up a collateral contract, that, if he delivered an abstract of title commencing from a certain time, the plaintiff engaged not to call upon him to perform the contract alleged in the declaration. [MAULE, J. That is not quite so. The plea does not set up a contract, that, if the defendant delivered an abstract commencing with a particular lease, he should be required to do no more: but it alleges it to be part of the contract declared on, that the defendant should deliver the limited abstract, and no other. . WILDE, C. J., referred to *Meyer v. Everth*, 4 Campb. 22.](a) In *Parker v. Palmer*, 4 B. & Ald. 387, the declaration stated that the defendant bargained for and bought of the plaintiffs a quantity of East India rice, according to the conditions of sale of the East India Company, to be put up at the next East India Company's sale by the proprietors, if required, at a certain price. The proof was, that, besides these conditions, the rice was sold "per sample." And ABBOTT, C. J., said: "The words, 'per sample,' introduced into this contract, may be considered to have the same effect as if the seller had, in express terms, warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Now, if there had been such an express warranty in this case, I should be of opinion that the plaintiff would not be bound to set it out in his declaration: for, he is only *536] bound to set out the contract for the breach of which *he declares. The words 'per sample' are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality. *The breach of that engagement may furnish a matter of defence to the defendant*; but the plaintiff does not rely on it, and need not state it in his declaration." And in *Sieveking v. Dutton*, 3 Man. Gr. & Scott, 881, where, to a count

(a) It was there held, that, where, upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale-note, which does not refer to the sample, this is not a sale by sample; and, if the goods turn out to be of inferior quality, the purchaser's remedy is, by an action on the case for a deceitful representation.

upon a contract by the defendant to receive a certain quantity of wool from the plaintiffs at a certain price, the defendant pleaded, that, at the time of making the contract, the plaintiffs produced a sample, and promised the defendant that the bulk was equal in quality and description thereto, but that the wool when tendered was found to be of inferior quality, wherefore the defendant refused to accept it: it was held, on special demurrer, that the plea was not bad, as amounting to non assumpsit, inasmuch as the contract therein set up, was not necessarily incompatible with the contract declared on. [MAULE, J. There, the consideration for the contract was truly stated: the promise alleged was, to receive from the plaintiffs a certain quantity of wool, at a given price; and the plea admits that the defendant entered into a contract for the purchase of wool, but particularizes it. There was nothing in the plea that was inconsistent with the contract declared on. Here, however, the defendant, in effect, says that he did not undertake to deliver an abstract of title.] He says, that, at the same time that he made the promise declared on—[MAULE, J. And as a part of the contract]—it was agreed that he should do a certain other thing qualifying the promise to deliver an abstract: like the qualification accompanying the contract in *Sieveling v. Dutton*. As between these parties, the term "contract" is to be understood in a more qualified sense than that implied by law.

**Peacock*, in reply. In *Parker v. Palmer* and *Sieveling v. Dutton* the defendants were seeking to set up the contracts [587 of the plaintiffs, not to alter or vary their own. Here, the plaintiff is charging the defendant with a breach of his contract to deliver an abstract, which the law interprets to be a contract to deliver an abstract showing a good marketable title. The plea, in effect, states that the defendant never did enter into the contract stated in the declaration, and therefore clearly amounts to non assumpsit. It is like a plea,—to an action for the breach of a covenant to repair,—alleging that the defendant covenanted to keep the premises in repair, damage by fire excepted, and that the premises were destroyed by fire.(a) *Smart v. Hyde* is the case of one contract pleaded against another.

WILDE, C. J. I am of opinion that the plea is bad, as being an argumentative denial of the contract alleged in the declaration. It is admitted, that the condition, that the vendor should deliver an abstract of title to the purchaser, is to be construed to mean the delivery of an abstract showing a good title to convey. Such, then, being the meaning of the condition as alleged in the declaration, the question is, whether the plea is or is not in denial of the promise in the declaration, to deliver an abstract in the sense above mentioned. The plea states that it was

(a) If the exception appeared upon oyer, the defendant would be entitled to judgment upon demurrer, or upon an issue on the destruction by fire, either *secundum veredictum* or *non obstante veredicto*, as the finding might be.

part of the contract, that the defendant should deliver an abstract of his title, commencing with a deed of conveyance dated the 24th of August, 1843, only, but that he should not be required to furnish any other abstract, or go into any *previous title;—which is saying, in-
 *538] effect, that he did not engage to deliver an abstract showing a good title, but only to deliver an abstract commencing with the deed referred to. If, therefore, the promise alleged in the declaration was a promise to deliver an abstract showing a good title to the premises, that alleged in the plea is clearly inconsistent with it. It does not, in terms, deny the contract declared on, but it sets up another incompatible contract. Now, it is a well-known rule of pleading, that, if the defendant means to deny the contract declared on, he must do so in apt and direct terms, and not argumentatively and circuitously. If any of the cases cited,—which, however, I do not admit,—have miscarried in this respect, they still are authorities for our present decision; for, they all recognise, and profess to act upon, the general principle. It is not necessary, in declaring upon a contract, to set out all its terms; it is enough to set out those parts of the promise the breach of which is complained of. In *Siveking v. Dutton*, the declaration averred that the defendant contracted to receive from the plaintiffs a certain quantity of wool. That allegation would *prima facie* embrace any description of article that came under the general mercantile name of wool. It was, therefore, competent to the defendant to say—"True it is I bought a certain quantity of wool, but it was wool of a particular quality and description; and, the wool you (the plaintiffs) tendered not being of that quality and description, I was justified in declining to receive it." A plea to that effect would not falsify the allegation. So, in most of the cases on this subject, where the pleas have been sustained, the defences set up have been quite consistent with the contract alleged in the declaration. Here, the plea is a denial of the contract declared on; not in terms, but by the statement of another contract which is inconsistent with it.

*539] *COLTMAN, J. I am of the same opinion. Here, a clear and distinct part of the contract as set out in the declaration, is, that the vendor (the defendant) would deliver an abstract of title to the purchaser, (the plaintiff.) The only meaning we can assign to these words, is, that the vendor contracted to deliver to the purchaser an abstract showing a good title to convey. It is necessary so to read the declaration, to entitle the plaintiff to maintain the action. The plea, setting up a contract to deliver, not an abstract showing a good title, but only an abstract commencing with a certain conveyance, is a denial of an essential part of the contract stated in the declaration, and falls within the general rule against argumentative traverses. Cases of nicety and difficulty, as to what does or does not amount to a denial of the contract, sometimes arise. *Smart v. Hyde* is a case of that description. But it appears to me that the court there arrived at a satisfactory conclusion. At all events, the

general principle is there recognised. The plea admitted both the promise and the breach, but set up a collateral agreement, whereby the plaintiff's right to maintain an action for the breach of contract was defeated by the non-performance, on his part, of a condition precedent. Without going through the other cases which have been cited, it is enough to say, that, in my judgment, the present case is free from difficulty.

MAULE, J. I also think the plaintiff is entitled to judgment, the plea being an indirect and circuitous denial of the contract alleged in the declaration. The declaration alleges a contract to deliver an abstract of the defendant's title, that is, an abstract showing a good title to convey. The contract set up in the plea,—to deliver only an abstract commencing with a deed of the 24th of August, 1843,—appears to me to be altogether *inconsistent with the contract declared on. The defendant seeks to substitute one that differs as to time, and which [*540 also compels the plaintiff to accept a certain deed as part of the title. He is setting up a contract that could not co-exist with that declared on; it is, therefore, a mere inferential and argumentative denial, which, according to the universally recognised principle, is not to be allowed. *Smart v. Hyde* is a very peculiar case. The parties appear to have agreed to be bound by a certain law regulating sales at the repository; the Court of Exchequer seem to have relied on that local law, on the very ground upon which we hold this plea to be bad. That case proceeded on the ground that the plea did not, either directly or indirectly, traverse that which was alleged in the declaration. The cases of *Parker v. Palmer* and *Sievekink v. Dutton* are free from difficulty. In declaring upon a contract of sale, the plaintiff may state the agreement on his part with the utmost generality, so as the terms used comprehend all the stipulations which form the consideration for the defendant's promise: but he need not state the whole of the defendant's promise; it is enough to state so much the breach of which is complained of; but then it must be stated with the utmost particularity. It is no variance to particularize that which is before stated generally. All that the two last-mentioned cases decide, therefore, is, that, where a plaintiff declares on a contract for the sale of goods, it is no denial of the contract to plead that the sale was subject to such terms and conditions as were agreed upon. The present case, however, is that of a plain and simple (though circuitous) denial of the contract alleged in the declaration.

CRESSWELL, J. I am entirely of the same opinion. Whatever difficulty there may apparently be in reconciling some of the cases, there is no doubt as to the *general principle. This plea is clearly an argumentative and circuitous denial of the contract stated in the declaration. [*541
Judgment for the plaintiff.

POWELL v. BRADBURY and Another. May 27.

In an action against the proprietors of a newspaper for the breach of a contract to employ the plaintiff as sub-editor, the defendants justified the dismissal of the plaintiff on the ground of his having, from improper motives, lent himself to the insertion of a garbled report of proceedings in a court of justice.

The court refused to allow the plaintiff to inspect, and take copies of, the original report and of the alleged garbled statement,—he having no recognised legal interest therein.

ASSUMPSIT by a sub-editor of a newspaper called *The Daily News*, against the proprietors, for a breach of a contract to employ him for a certain term.

The defendants pleaded, amongst others, a plea justifying the dismissal of the plaintiff, on the ground of his having, from improper motives, lent himself to the insertion in the newspaper, of a garbled report of certain proceedings in the court of bankruptcy at Bristol.

Huddleston, for the plaintiff, moved for leave to inspect and take copies of the original short-hand note, and of the copy thereof alleged to be garbled, in order that his witnesses might be prepared at the trial to rebut the charge. He referred to *Barry v. Alexander*, 1 Tidd's Practice, 9th edit. p. 592, where the rule laid down by Lord MANSFIELD was, that, whenever the defendant would be entitled to a discovery, he should have it here, without going into equity; and to *Inman v. Hodgson*, 1 Y. & J. 28, (a) where it was held that a party interested in documents in the custody of his adversary, is entitled to their production.

*542] **WILDE, C. J.** This application is not sanctioned by any of the authorities. To entitle a party to call for an inspection, I have always understood that he must have a direct interest in the document, or that his opponent must hold it under some trust, express or implied. The latter ground does not exist here; and I do not think the plaintiff has any such interest as would warrant the court in granting this rule. The practice was well settled by the case of *Ratcliffe v. Bleasby*, 3 Bingh. 148, 10 J. B. Moore, 523. There, the plaintiff and defendant being about to enter into partnership together, a draft of an agreement was prepared by the defendant's attorney, which, having been perused and approved of by the plaintiff's attorney, was engrossed, and executed by the defendant, but was not executed by the plaintiff. The plaintiff afterwards brought an action against the defendant for a breach of the agreement for the partnership, and applied for leave to inspect and copy the draft and deed. The court refused the application as to the deed, on the ground that the plaintiff, not having executed, had no interest in it; but they allowed it as to the draft, the plaintiff having an interest in that, and the defendant holding it as trustee for him. That case was followed by *Rowe v. Howden*, 4 Bingh. 539, n., 1 M. & P. 334, which was an action by the owners of a ship against a broker employed by them

(a) That was upon a bill of discovery.

to procure a cargo: and the court refused to give the plaintiffs leave to inspect and take a copy of a letter received by the defendant from a correspondent abroad, as far as it related to the plaintiff's ship, although the defendant acted as such broker at the time. I think it behooves us not to extend the rule. A bill of discovery stands upon a very different footing. If this court, under the idea of exercising an equitable jurisdiction, were to interfere in this way in all cases *where a bill of discovery would lie, it would be assuming one part of the jurisdiction, to the exclusion of another which is essential to the justice of the case. The present application, therefore, is neither warranted by authority nor supported by principle. It will be for the jury to judge whether or not the report is garbled, when it is laid before them.

The rest of the court concurring,

Rule refused.(a)

(a) And see *Rundle v. Beaumont*, 4 Bingh. 537, 1 M. & P. 396; *Blogg v. Kent*, 6 Bingh. 614, 4 M. & P. 433. 19 E. C. L. 278;

MORTIMER v. GELL. May 28.

To a count in assumpsit for money paid to the defendant's use, the defendant pleaded that the money was paid for differences on time bargains in the funds, in violation of the statute 7 G. 2, c. 8:—*Held*, that *de injuriâ* was a good replication.

To a count in assumpsit for money paid by the plaintiff for the use of the defendant at his request, the defendant pleaded—that, before the making of the promise in that count mentioned, the plaintiff had, contrary to the statute passed in the parliament of our late sovereign Lord George the Second, in the seventh year of his reign, intituled “An act to prevent the infamous practice of stock-jobbing,”(a) and after the first day of June, 1734, to wit, on the first day of January, 1846, negotiated the payment of, and had paid, for and on account of the defendant, a large sum of money, to wit, the sum of 1000*l.*,—being the sum of money in the said count mentioned, for certain differences by the plaintiff, for and on the behalf of the defendant, *bargained for and agreed to be paid by the defendant, for and on account of certain unlawful wages and contracts touching and relating to the public funds and railways of this kingdom, in lieu and instead of accepting and paying for transfers thereof to him the defendant from the vendors thereof; and that the said sum of money so alleged to have been paid by the plaintiff to and for the use of the defendant, as in the count mentioned, was, and each and every part thereof was, money so alleged to have been paid by the plaintiff for and on account of the defendant, as in the introductory part of the plea mentioned—verification.

To this plea, the plaintiff replied *de injuriâ*.

Special demurrer, assigning for causes, that the replication *de injuriâ*

(a) 7 G. 2, c. 8.

is, by the rules of pleading, inadmissible as a traverse of the several allegations contained in the plea, as the several facts therein stated do not amount to matter of excuse, but are a denial of the facts stated in the count, and show, that, in respect thereof, no cause of action ever accrued to the plaintiff, under the circumstances in the plea stated,—and that the replication is in other respects uncertain, informal, insufficient, &c.

Joinder in demurrer.

Channell, Serjt., for the plaintiff, prayed judgment. He observed that the case of *Cooper v. Garbett*, 1 D. & L. 969,—where, to debt by the payee against the maker of a promissory note, the defendant pleaded that he was induced to make, and did make, the note, by means of the fraud, covin, and misrepresentation of the plaintiff; and *de injuriâ* was held a good replication,—removed the only doubt that remained as to the applicability of the replication *de injuriâ* to a plea of this sort. There,

*545] *POLLOCK, C. B., in delivering the judgment of the court, says: “It has been said that this action is between the immediate parties to the suit [note], between whom an allegation of fraud is equivalent to saying that there was no binding contract; for which the observations of my brother PARKE, in the cases of *Humphreys v. O’Connell*, 7 M. & W. 370, 9 Dowl. P. C. 213, and *Parker v. Riley*, 3 M. & W. 230, are referred to. In the case, however, of *Scott v. Chappelou*, 4 M. & G. 336, 5 Scott, N. R. 148, 2 Dowl. N. S. 88, the Court of Common Pleas, although they do not expressly decide the point, do not support these *dicta*: and my brother COLTMAN expresses an opinion, that, in all cases where a contract is admitted by a party, but denied by matter of law, the replication *de injuriâ* may be pleaded.”

No counsel appearing to sustain the demurrer, the court gave
Judgment for the plaintiff.

PARSONS v. GINGELL. May 28.

Horses and carriages standing at livery are not exempted from distress for rent.

REPLEVIN. The declaration stated that the defendant on the 18th of July, 1846, at, &c., in a certain stable there, took the cattle, goods, and chattels, to wit, one brown mare, of the plaintiff, of the value, to wit, of 15*l.*, and unjustly detained the same, &c.

The defendant made cognisance as the bailiff of W. Martinson, alleging that one John Thurkettle, for a long time, to wit, for the space of one year, and one quarter of another year, next before, and ending *546] on, a certain day, *to wit, the 22d of May, 1846, and from thence until and at the said time when, &c., held and enjoyed the said stable in which, &c., with the appurtenances, as tenant thereof

to the said W. Martinson, by virtue of a certain demise thereof to the said John Thurkettle theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 50*l.*, payable quarterly, on the 22d of May, &c., in every year, by even and equal portions; and, because the sum of 50*l.* of the rent aforesaid, for the space of one year of the said tenancy, ending as aforesaid on the 22d of May, 1846, aforesaid, and from thence until and at the said time when, &c., was due and in arrear from the said John Thurkettle to the said W. Martinson, he, the defendant, as bailiff of the said W. Martinson, well acknowledged the taking of the said cattle, goods, and chattels in the said stable in which, &c., and justly, &c., as, for, and in the name of a distress for the said rent so due and in arrear to the said W. Martinson as aforesaid, and which still remained due and unpaid—verification, &c.

The plaintiff pleaded in bar—that, before and at the time of the making of the distress in the cognisance mentioned, the stable in which the cattle, goods, and chattels in the said declaration mentioned, were taken, was part and parcel of certain stables, whereof the said John Thurkettle was the tenant and occupier by virtue of a certain demise thereof from the said W. Martinson, as in the said cognisance mentioned; that, before and at the time of the making of the distress in the cognisance mentioned, the said John Thurkettle was a common public livery and bait stable-keeper, and was used and accustomed, in the way of his trade as such common public livery and bait stable-keeper as aforesaid, from time to time to keep, and to take in to keep and feed and clean, all other persons' horses, and also, from time to time, to take in to stand, and to take care of and clean, all *other persons' [547 coaches and carriages, who were minded to place the same with him, from time to time, as such common livery and bait stable keeper as aforesaid, for certain hire and reward to him therefore paid; and the trade and business of such common livery and bait stable keeper as aforesaid, then exercised and carried on in and upon the stable in the said cognisance mentioned: that all the said persons so placing and standing their said carriages, coaches, and horses with the said John Thurkettle as such common livery and bait stable-keeper as aforesaid, were entitled, as of right, to have and to take away off and from the said premises, the said carriages, coaches, and horses, at any time such persons might think fit and proper to have and use the same: that it was and is customary and necessary, and absolutely requisite for the exercising and carrying on of the trade of a common livery and bait stable keeper as aforesaid, so carried on by the said John Thurkettle in and upon the stable in the said cognisance mentioned as aforesaid, that such common livery and bait stable keeper should have the custody of, and keep, take, and receive, from time to time, the said carriages, coaches, and horses as aforesaid, in and upon the said premises wherein he exercised and carried on such trade of a common livery and bait stable keeper as aforesaid: that

the said John Thurkettle, during such his occupation of the premises as aforesaid, used and followed the said trade and business of a common livery and bait stable keeper as aforesaid, and used the said premises in his said trade and business as such common livery and bait stable keeper as aforesaid; that thereupon the plaintiff, shortly before the taking of the cattle, goods, and chattels in the declaration mentioned, to wit, on the 15th of July, 1846, sent and delivered, and the said John Thurkettle took, had, and received from the plaintiff, in the way of his, the said

*548] John *Thurkettle's, said trade and business as aforesaid, the cattle, goods, and chattels in the said declaration mentioned, in and upon the said stable, and the same remained and continued thereon, to be managed and dealt with by the said Thurkettle in the way of his, the said John Thurkettle's trade and business as aforesaid, and not otherwise, or for any other purpose whatever, from thence and until the making and levying of the distress in the said cognisance mentioned; of all which said premises the said W. Martinson had notice: and that, whilst the said cattle, goods, and chattels were in and upon the said stable, for the purposes and for the causes aforesaid, in the way of his, the said John Thurkettle's, trade and business as aforesaid, the defendant, to wit, at the said time when, &c., of his own wrong, seized and took away the said cattle, goods, and chattels, as a distress for rent due to the said W. Martinson from the said John Thurkettle, and afterwards unjustly detained the said cattle, goods, and chattels, against sureties and pledges, until, &c., in manner and form as the plaintiff had above thereof complained against him—verification, and prayer of judgment.

Special demurrer, assigning for causes, amongst others, that, although, the plea was founded upon a supposed exemption from distress for rent in arrear, of the goods and chattels in the declaration and cognisance mentioned, yet it set forth or showed no sufficient ground of exemption whatever, there being no such exemption in favour of livery and bait stable keepers known to, or recognised by, law; and that the plea was further defective in this, that there was nothing in the pleadings any where distinctly or clearly to show that the goods and chattels distrained upon were, in whole or in part, goods and chattels which, admitting the exemption to exist, could possibly fall within it, inasmuch as there was *549] no where in the plea any positive *description of the nature, quality, or kind of the said goods and chattels, the same being laid under a *videlicet*, and therefore might have been horses or carriages, or any thing else different therefrom, and that, if the plaintiff meant to rely upon the fact that the said cattle, goods, and chattels were horses and carriages, which, at the said time when, &c., had been delivered to, and were then in and upon the stables of, the said John Thurkettle, as a livery and bait stable keeper, to be dealt with by him in the way of his trade, it should have been more positively and distinctly averred in the plea, that the said cattle, goods, and chattels were carriages and

horses, or a carriage and horse, or a horse, falling within such supposed exemption.

Joinder in demurrer.

Channell, Serjt., (with whom was *Bramwell*), in support of the demurrer. The question is, whether, under the circumstances stated in the plea in bar, the horse of the plaintiff was exempt from distress by the landlord for rent in arrear. The special allegations introduced into the plea, as to the tenant being a "common and public" livery and bait stable keeper, and as to the mode of conducting the business, in no degree affect the question: a livery-stable keeper is not subject to the liabilities, or entitled to the privileges, of an innkeeper or of a common carrier. Unless there be a distinction between the case of a horse standing at livery, and that of a carriage, the point is decided by *Francis v. Wyatt*, 8 Burr. 1498, 1 Sir W. Blac. 483, where it was held, that a carriage standing at livery, is distrainable for rent by the lessor of the premises. Lord KENYON, observing upon that case in *Gorton v. Falkner*, 4 T. R. 567, says: "The question was, *whether a livery-stable keeper had the same privilege as a common inn, so as to protect a carriage standing at livery: the court thought that the same reason did not exist in both cases, and therefore that the privilege of the common inn should not be extended to a livery-stable." The general right of the landlord to distrain for rent, is subject to certain exceptions. Lord COKE, speaking of what may be taken, and what not, says: (a) "1. It must be of a thing whereof a valuable property is in somebody; and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distrained. 2. Although it be of valuable property, as a horse, &c., yet, when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. 3. Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as, a horse in a smith's shop shall not be distrained for rent issuing out of the shop, nor the horse, &c., in the hostery, (b) nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor any thing distrained for *damage fesant*, for it is in custody of the law, and the like," &c. &c. These, and other exceptions from distress, are noticed in *Simpson v. Hartopp*, Willes, 512, where WILLES, C. J., says: "Things sent or delivered to a person exercising a trade, to be carried, wrought, or *manufactured* in the way of his trade, as a horse in a smith's shop, (c) materials sent to a weaver, or cloth to a tailor to be made up, are privileged, for the sake of trade and *commerce, which could not be

(a) Co. Litt. 47 a.

(b) Baited in an inn or hostery, Bro. Abr. tit. *Distress*, pl. 57, citing (a dictum of Brian, C. J. in) H. 22 E. 4, no. 22, pl. 15; and see Mayn. Edw. 2, pp. 556, 557.

(c) Willes, 512.

carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are:" and in *Gisbourn v. Hurst*, 1 Salk. 249, it was agreed *per cur.* "that goods delivered to any person exercising a *public* trade or employment, to be carried, wrought, or *managed* in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent." ALDERSON, B., in *Muspratt v. Gregory*, 1 M. & W. 645, Tyrwh. & Gr. 1086, 2 Gale Exch. 158, referring to the case in Willes, says: (a) "In *Simpson v. Hartopp*, the word '*managed*' appears to be used as synonymous with '*manufactured*.' But that is too limited a sense of the expression; for, the courts have held that goods sent to a factor by a merchant are privileged from distress, under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer, and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be, that, where, in order to the exercising such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered." Here, the horse in question was not "*managed*" in the sense used in this definition. A livery-stable keeper has not, by law, a lien for the keep of horses left with him, (b) as an innkeeper has. (c) And in *Adams v. Grane*, 1 C. & M. 380, where *552] it was held that goods sent to an auctioneer to be sold on *pre-mises occupied by him, are privileged from distress for rent, the exemption is put solely on the ground of the interest of the public and the convenience of trade,—arguments which have no application to this case.

Pickering, contrà. (d) The horse in question falls within the second class of exemptions mentioned by WILLES, C. J., in *Simpson v. Hartopp*, viz., "Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." *Francis v. Wyatt* is distinguishable: nothing is there said as to the *duties* of the livery-stable keeper; and it may be observed that no formal judgment is to be found on the roll. [MAULE, J. I do

(a) S. C., in error, 3 M. & W. 677.

(b) See *Wallace v. Woodgate*, R. & M. 193.

(c) See *Yorke v. Grenough*, 2 Ld. Raym. 86.

(d) The points marked for argument on the part of the plaintiff, were—"That the plea does sufficiently confess the demise laid in the cognisance, and that the words '*a certain demise as in the said cognisance mentioned*,' are sufficient to indicate the identity of the demise in the plea with that alleged in the cognisance; that the plea in bar is good both in form and in substance; that a horse standing at a livery-stable keeper's, at livery, is exempt from distress; that the goods and chattels mentioned in the plea in bar are exempt from distress; that the plea shows a sufficient ground of exemption in favour of the said goods and chattels; and that the plea in bar sufficiently alleges that the goods and chattels distrained upon were within the exemption at the time of the distress."

not exactly see why the obligation to *receive*, should affect the right.(a) I could very well understand it, if the party depositing the goods were under any obligation or necessity to do so.] In *Brown v. Shevil*, 4 N. & M. 277, 2 Ad. & E. 188, speaking of the case of *Francis v. Wyatt*, 4 N. & M. 283, PATTESON, J., says: "That was the case of a chariot in the hands of a livery-stable keeper, which was held not to be protected. But it is to be observed, that, in the report of it in 3 Burrow, there is no judgment given by the court in form; and, from that which does appear, it would *rather seem that the plaintiff gave up the point. Besides, there is this difference between the cases, [*553 that a chariot in the hands of a livery-stable keeper is there in his custody merely; whereas, here, there was something to be done by the person to whom the beast (b) was sent, in the way of his trade." In *Gorton v. Falkner*, Lord KENYON assumes the decision in *Francis v. Wyatt* to have proceeded upon the ground that the privilege accorded by law to an innkeeper, did not extend to a livery-stable keeper. And BAXLEY, B., in *Adams v. Grane*, states it to be one ground of that decision, that "the carriage was staying there for a *permanency*, and so occupying the premises for which the rent was payable." Here, the plea in bar alleges that Thurkettle carried on, upon the premises, the trade of a *common public* livery and bait stable keeper; that it was necessary for the exercising and carrying on of such trade, that he should have the custody of carriages and horses there; and that the horse in question was delivered to, and received by Thurkettle in the way of his said trade, and remained and continued on the premises, to be managed and dealt with by him in the way of his said trade, and not otherwise. [MAULE, J. The horse was sent to remain, and to be groomed and fed, as incidental to his remaining. It is not like the case of goods sent to a tradesman or artificer, to have something done upon them.] In *Muspratt v. Gregory*, PARKE, B., says: "Upon consideration of these authorities, it is clear that the principle of the exemption, is, the public good: that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and *thus supply themselves with the commodities of life. Such being the principle, it appears to me, [*554 that, in order to give it full effect, we ought to hold that not merely chattels are privileged from distress, which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt, which are necessarily placed there, and whilst they are there, in order to enable their owner to enjoy the full benefit of the trade or business, as it is there

(a) Vide H. 22 E. 4, fo. 22, pl. 15.

(b) *Brown v. Shevil* was the case of a bullock sent to a butcher to be slaughtered; and it was held that it could not be distrained for rent.

carried on. It is not, I think, because the chattels are to be *worked* upon the lands so chargeable, (though that is the most familiar case,) but because they are *necessarily placed* on those lands, that the privilege is allowed by the law; and if goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them." And, referring to the proposition adopted by WILLES, C. J., in *Simpson v. Hartopp*, that those goods are privileged which are delivered to any person exercising a *public* trade or employment, *to be carried, wrought, worked up, or managed* in the way of his trade or employ—which, the learned baron holds to be too narrow; he adds: "I may also observe, with reference to one part of this proposition, that there appears to be no dispute but that the word 'public' is to be understood to refer to every trade or employ carried on *generally* for the benefit of all persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals: although it be not 'public' in the sense that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not—a predicament which is peculiar, at this day, to an innkeeper, or perhaps a carrier also; though Lord HOLT, in 12 Mod. 484, (a) considered it to belong to all other trades which a man professed, to carry on for all persons

*555] *"indiscriminately."* (b) And Lord ABINGER says: "By the general rule of law, all goods found upon the premises of a tenant who is indebted to his landlord for rent, are liable *primâ facie* to distress. That is the general rule. The courts of justice have engrafted (c) upon that rule certain exceptions; and by those exceptions, which are clearly established, we are bound. * * * A third exception,—within which it has been attempted to bring this case,—is, where the trade is of such a nature as that the goods which are employed upon

(a) *Lane v. Sir Robert Cotton*, 12 Mod. 472.

(b) For which position Lord Holt cites Keilwey, 50. But that case is simply this: "Note, that it was agreed by all the court, that, where a smith refuses (*denie*) to shoe my horse, or a hosteler refuses me to have lodging (*herberge*) in his hostery, I shall have action on the case, notwithstanding that no act is done; for, this sounds not in covenant. But, when a carpenter makes a bargain to make me a house, and does nothing, no action on the case, because that sounds in covenant. But, if he mismakes the house, then action on the case well lies." The reporter adds: "Note, that, in this case, a man shall not have an action against the hosteler, but shall make complaint to the ruler, by 5 E. 4, fo. 2. Contra 14 H. 7, fo. 22." In the first of these references, P. 5 E. 4, fo. 2, pl. 20, we find—"Also it was said by all the justices, that, if a common hosteler will not lodge me, I shall not have action against him, but shall complain to the ruler of the vill, and he shall have direction thereof." This reappears without comment in Bro. Abr. tit. *Action sur le case*, pl. 92. The second reference is to an argument of Higham, K. S., in a case of quare impedit—*The King v. The Bishop of Chester and Another*, P. 14 H. 7, fo. 21, pl. 4,—where the serjeant says, (fo. 22,) with reference to the duty of the ordinary to examine the presentee, "So, if I come to an hosteler, and pray him to be lodged (*herberge*) with him, and he says that at that time he will not, but, if I come at another time, he will willingly, I shall have an action upon my case; because it was his duty to lodge me, and by law he was bound to do it. So, of the bishop," &c.

(c) The courts appear to have *recognised* certain exceptions, by which they considered the rule to have been originally limited; but they would have had no power to *engraft* any new exception upon a general rule already established.

the premises, are wrought or manufactured, or that something is done with them, there. Now, looking at every one of the cases in which that *exception has been acknowledged or established, it will be found that the trade itself consists in dealing with other men's goods. Take the familiar example of the blacksmith's shop: the landlord there does not let to the blacksmith his shop that he may shoe his own horses only, but takes a rent from the man for exercising a trade which consists in shoeing other people's horses. If the landlord were allowed to distrain the horses sent to be shod in that shop, he would be in fact destroying the trade for which he was receiving rent. So, in the case of a tailor: formerly, the practice was, not for tailors to furnish their customers with the goods themselves, but to receive the cloth and work it up into garments: therefore, a tailor was supposed to come within that rule; for, his trade was understood to consist in working up other men's materials. So, of the wharfinger, (a) whose trade consists in receiving and accepting as a deposit other men's goods, and not his own. So of a factor, (b) who has no goods of his own to carry on his trade, and whose trade therefore consists entirely in dealing with other men's goods." All that reasoning, and many of the instances there put, apply with equal force to the present case. In *Findon v. M'Laren*, 6 Q. B. 891, a carriage in the hands of a coachmaker and commission-agent, for the purpose of sale, and in *Gibson v. Ireson*, 3 Q. B. 39, materials in the house of a manufacturer, for the purpose of his trade, (c) were held not distrainable.

Channell, Serjt., in reply. All the cases relied on by the other side, are cases of goods deposited for sale, or *for the purpose of being returned in an altered shape. Brewers' casks sent to a public-house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house: *Joule v. Jackson*, 7 M. & W. 450. Lord ABINGER there says: "It is too late at this day to enter into the principles of the law as to the landlord's power to distrain, where the case does not fall within any of the decisions on the subject; it having been determined by the majority of this court, and afterwards by a court of error, (d) that the principle of those decisions ought not to be extended. If a cooper had had the casks in his possession, for the purpose of repairing them, in the way of his trade, they would have been exempted from distress. * * * But, here, nothing is to be done to the casks, which are merely left with the publican till they are empty. That is very different from the case of an article left for repair."

(a) And see *Thompson v. Mashiter*, 1 Bingham 283, 8 J. B. Moore, 260.

(b) And see *Gilman v. Elton*, 3 Brod. & B. 75, 6 J. B. Moore, 243; *Matthias v. Menard*, 2 C. & P. 353.

(c) And see *Read v. Burley*, Cro. Eliz. 549, 596; Co. Litt. 47 a, note 295.

(d) See *Muspratt v. Gregory*, 1 M. & W. 633; *Tyrwh. & Gr.* 1086; 2 Gale, Exch. 158, S. C. in error, 3 M. & W. 677.

WILDE, C. J. I am unable to distinguish this case from the principle on which *Francis v. Wyatt* was decided; and I am not aware that that case has been in any degree impugned: on the contrary, I find it cited as an authority in the most modern treatises on this subject. The plea in bar there stated that the coach-house in which, &c. was parcel of certain common coach-houses and stables occupied by the tenant in his business of a common and public livery-stable keeper, and that the plaintiff's carriage was standing at livery there when distrained by the defendant. It is in no other respect different from the plea in bar here, except that this plea goes on to describe what the business of a common and public livery-stable keeper is. The two pleas are, I apprehend, the same in effect. The court, in that case,*—after two very elaborate and *558] learned arguments, and after grave consideration, and a strong intimation that their decision might operate inconveniently upon a very large class of persons,—felt bound to hold the carriage not to be exempt from the landlord's claim. The party claiming exemption is bound clearly to show that he is within one of the acknowledged exceptions to the general rule. The plea states that the horse in question was sent and delivered to, and received by, Thurkettle in the way of his trade and business as aforesaid, in and upon the said stable, and *the same remained and continued thereon, to be managed and dealt with by Thurkettle in the way of his trade and business as aforesaid*, and not otherwise. The question in all these cases is, whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with a view of having labour or skill bestowed upon them;—which is the principal object, and which incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class: but, if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration. The case of a horse sent to a livery-stable *merely* to be cleaned and fed, is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming being only incident to the principal object. Considering this as the case of a horse that is sent to remain upon the premises, and that all the livery-stable keeper has to do, is to bestow upon it such feed and management as are requisite to the health and comfort of the animal while there,—under which class does it range itself? The general principle of law undoubtedly is, that all goods found upon the premises are *559] liable to be distrained for *rent. Upon that general rule, two exceptions only are engrafted. The first is, where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner as soon as that purpose has been accomplished. Such is the case of the horse sent to the

farrier to be shod: the horse is necessarily taken there for the purpose, and necessarily remains there while it is being performed. Such likewise is the case of the tailor, who, it seems, formerly received the materials from the employer, to be fashioned into garments. The cloth, or other material, was sent to the shop for the mere purpose of having work done upon it, and was to be returned in an altered shape. These remarks embrace a very considerable range of cases, in which goods are received for the purpose of having something done to them, not for the purpose of occupying the premises. The second exception is, where goods are sent to the party's premises in the way of his trade, for the purpose of sale. It appears to me that all the cases cited that profess to range themselves under this head, strictly do so. Upon what precise ground the privilege of goods at a wharfinger's rests, does not very distinctly appear. I incline to think it arose from the circumstance of there having in former times existed only certain wharfs, at which all persons were *obliged* to land their goods, and at which it does not appear that goods were landed for any other purpose than that of sale. *Thompson v. Mashiter* was the case of goods consigned by the owner to a factor for sale, and deposited by the latter in a warehouse belonging to, and part of, a public wharf, at a weekly rent, until such sale could be effected; and they were held not liable to be distrained.

If I am correct in saying that these two classes embrace all the cases of exemption, to which of them does the present case attach itself? Was the mare sent to Thurkettle's stables for the mere purpose of being fed *and groomed, or was she sent there for the purpose of being kept on, and occupying, the premises? It appears to me that [*560 all beyond the occupation of the premises by the mare, was merely incidental to her remaining there. If we were to hold this case to be distinguishable from that of *Francis v. Wyatt*, it could only be so upon the ground that the mare was to be fed, cleaned, and managed while there. But that, I apprehend, for the reasons before stated, affords no ground of difference. Corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is, it seems, under the same protection against a distress for rent, as if it were deposited in a warehouse belonging to the factor himself: *Matthias v. Mesnard*. But corn sent by the owner to a granary-keeper, to be kept for *him*, would not, I apprehend, be within the exemption: the circumstance of its being turned and dressed whilst in the granary, to prevent its heating, would not bring it within the class of excepted cases. It is extremely important that the rule upon this subject should be laid down broadly and distinctly. It appears to me that this case falls within the principle of *Francis v. Wyatt*, and that there is no solid ground upon which to distinguish it; and therefore that the plea in bar is no answer to the avowry, and that the defendant is entitled to our judgment.

COLTMAN, J. I am of the same opinion. If I were now for the first time called upon to say what ought to be the limit of the exemption of goods from distress, I might feel disposed to concur in what is suggested by Lord ABINGER in *Muspratt v. Gregory*, 1 M. & W. 633, Tyrwh. & Gr. 1086. It is not our province to invent rules. It is our duty to discover and to be guided by the rules that guided our *predecessors: and I think we should be departing from the exercise of our proper functions, if we disregarded the authority of *Francis v. Wyatt*, which has never, to my knowledge, been overruled or questioned. (a) The case does not fall within the second class of exemptions put by WILLES, C. J., in *Simpson v. Hartopp*, which seems to be well recognised. I should be much disposed to think that the trade of a livery-stable keeper is sufficiently "public" to bring it within the exemption, if in other respects applicable. It clearly is not limited to the case of premises, the tenants or occupiers of which are under a legal obligation to receive the goods of all comers. Here, however, the mare was sent to the occupier of premises in question, not for the purpose of being "carried, wrought, worked up, or managed in the way of his trade or employ;" that is, sent for something peculiar to his trade; but for the purpose of residing and abiding there during her owner's pleasure. The case, therefore, is clearly not within that exemption. (b)

MAULE, J.—For the reasons already given by the Lord Chief Justice and my brother COLTMAN, to which I do not think it necessary to add any thing, I concur in holding this case not to fall within any of the exceptions out of the general law.

CRESWELL, J., concurred.

Judgment for the defendant. (c)

(a) And see *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(b) So, in the case of an inn, the exemption does not extend to the goods of a party who occupies as a permanent lodger, and not as a transient guest. So, the cattle of a stranger, which, as soon as, by reason of their being levant and couchant, they may be said to have occupied the land, become liable to be taken as a distress for rent.

(c) In *Lewis v. Gingell*,—between which and the principal case there was no other distinction than that there a carriage and a cabriolet were, as well as the horses, distrained under similar circumstances,—judgment was likewise for the defendant.

*562] *HARRISON v. COTGREAVE. May 28.

To a count by drawer against acceptor of a bill of exchange, the latter pleaded that he accepted the bill in blank whilst he was an infant, that the plaintiff afterwards altered it by dating it of a day subsequent to the defendant's attaining his majority, and that the defendant never ratified or assented to such alteration after he became of age.—*Held* (on special demurrer,) that the plea was not multifarious, double, or ambiguous.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange. The first count of the declaration stated, that, on the 16th of February, 1846, the plaintiff made his bill of exchange in writing, dated, to wit, the day and

year aforesaid, and directed the same to the defendant, and thereby required the defendant, two months after the date thereof, to pay to the plaintiff's order, in London, 89*l.* 15*s.* 8*d.* value received; and that the defendant, afterwards, and before the commencement of the suit, to wit, on the day and year aforesaid, accepted the said bill, &c. &c.

Plea.(a) That the defendant accepted the bill of exchange in the first count mentioned, whilst he the defendant was an infant within the age of twenty-one years, to wit, of the age of eighteen years—the said bill of exchange being, at the time of such acceptance thereof, without any date written thereon; and that the plaintiff afterwards, to wit, on the day and year in the said first count mentioned, altered the said bill of exchange by dating the same, and writing a certain date thereon, to wit, the day and year last aforesaid, whereby the said bill of exchange was made to bear date a day long after the making of such acceptance of the said bill, and after the time at which the defendant attained his age of twenty-one years, to wit, the day and year last aforesaid; and that there never was any license or authority, ratification, or assent of the defendant for or *to such alteration as aforesaid, given by the [563] defendant at any time after the defendant had attained his age of twenty-one years: and the defendant further said that there never was any other acceptance by the defendant of the said last-mentioned bill of exchange, except as in this plea aforesaid.—Verification.

Special demurrer, assigning for causes, that the plea was double and multifarious, and relied on several defences, inasmuch as it stated that the defendant accepted the bill whilst he was an infant, also that he accepted it without any date written thereon, and that there never was any other acceptance by the defendant of the said bill except as in the plea alleged, also that the bill was, after the acceptance thereof, altered by the plaintiff in the manner alleged in the plea, and that there never was any license or authority, ratification, or assent of the defendant, for or to the supposed alteration, given after the defendant attained his age of twenty-one years:—that thereby the defendant attempted to set up, and stated, ground for several defences, viz. first, infancy at the time of accepting the bill, secondly, that he never accepted the bill as declared on, thirdly, that the plaintiff altered the bill without the defendant's authority;—that the plea in part amounted to and contained within itself an argumentative denial of the defendant's having accepted the bill declared on, inasmuch as it alleged that the defendant accepted the bill without date, and that there never was any other acceptance by him of the bill; whereas, the count alleged that the bill *was* dated;—that the plea, being in denial, and argumentative as aforesaid, ought to have concluded to the country, instead of with a verification;—that the plea was ambiguous and wanted certainty, and the plaintiff could not collect from

(a) The declaration contained several counts on several bills and notes, the pleas to which were similar to that set out, and which pleas were also specially demurred to.

it on what matter or matters of defence the defendant meant to rely, whether on the three grounds above suggested, or any two or one of *564] *them, and, if on some two or one of them, on which two or one;—that the plea was double, in setting up the defence of infancy, and the defence of the bill's having been altered as therein alleged;—that it was ambiguous and uncertain on the plea, whether the defendant meant to say that he never accepted the bill in the count mentioned or assented to the alleged alteration, or whether he meant to admit such acceptance or his assent to such alteration, but meant to rely on the alleged fact of his minority at the time of such acceptance or assent;—that the plea was so framed that the plaintiff could not safely reply to it by taking issue on the whole or some part or parts of it;—and that the plea was repugnant, as it admitted, in one part thereof, that the bill was accepted as alleged in the declaration, but stated matter in another part of it, which, if true, showed that there was no such acceptance as alleged.

Joinder in demurrer.

Crompton, in support of the demurrer. The plea is multifarious; it sets up several matters, each of which, if true, would afford a defence. In the first place, it alleges that the defendant was an infant at the time he accepted the bill; that of itself would be a complete answer. It then goes on to state, that when the defendant accepted the bill, it was without a date: that is a positive denial of the acceptance of the bill stated in the count, and would be a good defence upon non acceptavit. [MAULE, J.—The plea admits that the defendant accepted the bill as stated in the declaration.] Further, it alleges an unauthorized alteration of the bill by the drawer after acceptance, by the insertion of a date; that is an indirect negation of the averment in the declaration. [WILDE, C. J.—The acceptance of a bill in blank gives an implied authority to the drawer to put a date to the instrument. The allegation as to the *565] alteration is *merely useless. MAULE, J.—The insertion of a date is no alteration.] At most, the blank acceptance would only be evidence of authority to fill in the date. But the bill was complete from the making, without a date. In *Byles on Bills*, (8d edit. p. 89, 5th edit. p. 54,) it is said that a date is not, in general, essential to the validity of a bill or note; and that, if there be no date, it will be considered as dated at the time it is made; for which are cited the cases of *De La Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 178; and *Giles v. Bourne*, 6 M. & S. 78. Had the drawer any authority to put a false date to the bill? [MAULE, J.—The defendant shows the authority by saying that the date was put. I think that the plea admits, not a valid acceptance, but that the defendant wrote an acceptance on the bill, or that the written acceptance was put on by his authority.] In *Davidson v. Cooper*, 13 M. & W. 348, to assumpsit as a guarantee, one of the defendants pleaded, that, after the making of the

guarantee, and whilst it was in the hands of the plaintiff, it was, without the knowledge of that defendant, by some person to him unknown, altered in a material particular, by affixing two seals by and near to the signatures of the defendants, as and for their seals, thereby causing the guarantee to purport to have been sealed by the defendants, and to be the deed of the defendants; by reason whereof, the guarantee became void in law. This plea having been traversed, and found by the jury for the defendants, and decided to be sufficient by the Court of Exchequer, on a motion for judgment *non obstante veredicto*; it was held, upon error brought, that the plea was a good answer to the declaration. [MAULE, J.—The effect of that is, that the party to whom an instrument is delivered, is bound to keep it unaltered. But that does not apply here. This is, in truth, *a plea of infancy. It admits that [*566 there was a transaction amounting to an acceptance: and it explains what that transaction was—that the defendant, being an infant, accepted the bill in blank, and that the plaintiff afterwards inserted a date, but that the defendant never ratified that alteration after he came of age; and so the defendant never did that which in point of law amounted to an acceptance.] The plea alleges all this to have taken place after the acceptance mentioned in the declaration. [CRESSWELL, J.—The substance of the plea is—that the plaintiff altered the bill after acceptance, and that the defendant never authorized or assented to the alteration after he attained his majority.] That, clearly, makes the plea double. [CRESSWELL, J.—There is no allegation that the alteration was made without the defendant's consent; and therefore the plea is not double.] It is not the less double, because one of the defences is ill pleaded. [CRESSWELL, J.—It is not a defence ill pleaded: enough is not stated to make the alleged alteration amount to a defence.] That the bill is accepted with a date, and without a date, are inconsistent statements. [CRESSWELL, J.—You say, that, in the absence of a date, the law will imply a date.]

Channell, Serjt., (with whom was Townsend,) *contrd*, was not heard.

WILDE, C. J. I am of opinion that this plea is not multifarious, that it does not disclose two defences, and that it is not ambiguous. The count states that the plaintiff, on a certain day, made his bill of exchange, dated, to wit, the day and year aforesaid,—the plaintiff not professing to give the date. It is said that the bill was perfect without a date. The defendant might well have accepted the bill, though it bore no date. The plea states, that the defendant accepted the bill whilst *an infant; that, at the time he so accepted it, the bill bore no date; that the plaintiff afterwards altered the bill by [*567 inserting a date purporting that the bill was made after the defendant came of age; and that the defendant never ratified or assented to such alteration after he came of age. This is a simple statement of facts which we must take to be true. The defence intended to be relied on,

is, that the defendant is not, by reason of his infancy, bound by his acceptance. He has introduced several facts for the purpose of avoiding being concluded by the date. It is not stated that the date was inserted without the defendant's knowledge. The mere statement of a fact which, coupled with another fact, would afford a defence, cannot be treated as a defence ill pleaded, so as to give rise to the objection of duplicity. The statement as to the alteration of the bill appears to me to have been introduced merely for the purpose of showing a defence by reason of infancy: it in effect amounts to this—although the bill now appears to bear date after the time the defendant attained the age of twenty-one, the date was in truth put in without such authority and sanction of the defendant as to bind him. I think that the defendant is entitled to judgment.

COLTMAN, J. I was at first inclined to think that the plea contained two distinct grounds of defence—infancy—and the unauthorized alteration of the bill after acceptance. But I am now satisfied that that is not so. I take it to be no ground of objection to a plea, that it states that which of itself would be a good defence, as introductory to a second substantive defence. Infancy here might have been a sufficient defence. But the plea is not double, if the allegation of the defendant's infancy at the time of the acceptance, is a necessary part of that which is relied on as the defence. *How stands the matter with regard to the
*568] alteration, as a ground of defence? The plea does not allege that the alteration was made without the assent of the defendant. It may be that the alteration was such as to render it excusable. To make it a defence, it was necessary to show that the alteration was unjustifiable. How does the defendant do so here? By stating that he was an infant when he accepted the bill; that a false date was inserted in the bill to make it appear to have been accepted by him after he attained his full age; and that he never assented to such alteration after his majority. The statement of infancy, therefore, was an essential ingredient in raising the defence intended. It appears to me that the fact of the alteration affords a ground of defence in respect only of the circumstance of the defendant's having been an infant at the time of the acceptance.

MAULE, J. I think this plea resolves itself into a single plea of infancy. It states that the defendant accepted the bill in a particular manner, viz., in blank; that a date was inserted by the plaintiff before he came of age, and that such alteration was not ratified and assented to by the defendant after he became of full age. The plea, therefore, shows an alteration that was competent to be made, and by a person who was competent to make it, except in so far as it goes on to show that the alteration was inoperative, by reason of non-ratification by the defendant after he came of age. Possibly, a plea simply alleging that the defendant was an infant at the time he accepted the bill, would have been a defence. But that is not this plea.

CRESSWELL, J., concurred.

Judgment for the defendant.

*WRIGHT v. HUTCHISON. *May 27.*

[*569]

In pleading a discharge under the 5 & 6 Vict. c. 116, the proceedings in conformity with s. 4, or the order for protection and distribution under sect. 10, should be set out.

ASSUMPSIT, by endorsee against acceptor of a bill of exchange, and upon an account stated.

Plea—that, after the making of the said several contracts and promises, and the accruing of the causes of action, and each of them, in the declaration mentioned, and before the commencement of the suit, to wit, on the 30th of July, 1844, the defendant,—not being a trader within the meaning of the statute in force relating to bankrupts at the time of the making and passing of the act of parliament thereafter mentioned, and having resided twelve calendar months within the London district, under and by virtue of, and according to the directions and provisions of, a certain statute made and passed in the session of parliament held in the fifth and sixth years of the reign of our lady the now queen, intituled “An act for the relief of insolvent debtors,” duly presented her petition for protection from process, to the court of bankruptcy in London; that the said petition was forthwith afterwards, to wit, on the day and year last aforesaid, filed of record in the said court of bankruptcy; and that such proceedings were had in the said court of bankruptcy, upon the said petition of the defendant, that afterwards, and before the commencement of the suit, to wit, on, &c., aforesaid, a final order was made by J. E., Esq., then being one of the commissioners of the said court of bankruptcy—duly authorized in that behalf,—for the protection of the person of the defendant from all process, and for the vesting of the estate and effects of the defendant in A. B. Belcher, one of the official assignees of the said court of bankruptcy; that thereby, and by force and *virtue of the said order, the defendant was discharged of and from the several contracts and promises and causes of action, and each of them, in the declaration mentioned; and that the said order and discharge still remained in full force—verification. [*570]

Special demurrer, assigning for causes—that it is not shown in the plea, that the defendant was entitled to present the said petition in the plea mentioned, or that she was a person over whom the court of bankruptcy had jurisdiction, or that she had done those acts necessary to bring her within such jurisdiction; for, that there is no allegation in the plea that notice was given by the defendant to one-fourth part in number and value of her creditors, of her, the defendant's, intention to present a petition for protection from process to the court of bankruptcy of London prior to the presenting by her of such petition, or that such notice was inserted twice in the London Gazette, and twice in some other newspaper circulating within the county in which the defendant, at the time of inserting such notice, resided,—that the plea does not allege that the defendant gave such notice as in the said act is men-

tioned, or caused the same to be inserted as therein mentioned,—that the mode of pleading adopted by the plea, by a *taliter processum est*, is insufficient and improper, and the proceedings should have been set forth,—that the said petition having been presented under and by virtue of, and according to the directions and provisions of, the said statute alone, is not sufficient to warrant the final order therein mentioned,—that the plea does not state that the defendant resided in the said London district twelve calendar months next before the presenting or filing of the said petition, but merely states, generally, that the defendant had resided twelve calendar months in the said district, which residence may have been at any time,—that the final order in the plea mentioned,

*571] *does not appear to have been made according to law, or to the said act of parliament,—that such order is alleged in the plea to have been made for vesting the estate and effects of the defendant in one of the official assignees only; whereas, according to the said act, the estate and effects of the insolvent should have been vested by the said order, in the official assignee, together with the assignee to be chosen by the majority, in number and value, of the creditors who attended before the commissioner on the day of making such final order, or that no creditors so attended, or that no such assignee was chosen,—that it does not appear in the plea, that the said final order was made for *distribution* as well as *protection*, according to the said act,—that it does not appear from the plea that the said final order was made according to the provisions of the said act,—that it does not appear by the plea, that any schedule was annexed to the petition of the defendant, in such plea mentioned to have been presented to the said court of bankruptcy, or that the provisions and directions of the said act, as to the said schedule and petition, have been observed or complied with by the defendant,—and also that, in other respects, the plea is insufficient, uncertain, and informal, &c.

Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The plea is bad in substance. It sets up a discharge founded on the 5 & 6 Vict. c. 116, but neither does it adopt the general form given by s. 10,(a) nor does it

*572] set out the *proceedings anterior to the final order, under s. 4;(b) nor is any mention made of the appointment of a creditor's

(a) Which enacts, "that, if any action or suit is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said action or suit, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the commissioner, with proof of his handwriting, shall be sufficient evidence."

(b) The 4th section prescribes the mode of examination before the commissioner, preparatory to the second order, and directs that such order shall be called a final order, and shall be "for the protection of the person of the petitioner from all process, and for the vesting of his estate in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority, in number and value of the creditors who may attend before the commissioner on such day," &c.

assignee. In *Leaf v. Robson*, 13 M. & W. 651, 2 D. & L. 646, the Court of Exchequer held a plea like this to be bad, for not pursuing the form given by the 10th section, or showing that all the requisites of the 4th section had been complied with. An intimation of opinion to the same effect had previously been given by this court, in *Nichols v. Payne*, 7 M. & G. 927, 8 Scott, N. R. 732, 2 D. & L. 629. The question came again under the consideration of this court, in *Cook v. Henson*, ante, vol. I. p. 908, 3 D. & L. 177, and in *Gillon v. Deare*, ante, vol. II. p. 309, 3 D. & L. 417. In *Cook v. Henson*, to an action by an endorsee against the acceptor of a bill of exchange, the latter pleaded, that, before the commencement of the suit, a petition for his protection from process was duly, and according to the statute, presented by him to the court of bankruptcy; that, afterwards, and before action brought, a final order for protection and distribution was made in the matter of the petition, by J. E., a commissioner of the said court duly authorized in that behalf; and that the causes of action in the declaration were contracted before the date of the filing the petition: and the court held the plea sufficient, within the 10th section. In *Gillon v. Deare*, a plea in precisely the same form as the present, was held bad on special demurrer, for the causes now assigned. [MAULE, J. There the plea did not aver the order to *have been "for protection and distribution," nor did it set out the order in terms, so as to show that it was in truth an order for protection and distribution.] Notwithstanding the difference of opinion that existed in that case, the decision of the court expressly negatives the validity of this plea.

Unthank, contra. It may be conceded, that the case of *Gillon v. Deare* would have been decisive of the fate of this plea, but for the strong intimation of opinion thrown out by ERLE, J. "The third objection," says that learned judge, "is, that the pleader has not exactly followed the words of the 10th section. But to my mind, he has taken a more accurate definition of the order therein mentioned, which evidently refers to the final order spoken of in section 4. Now, the order mentioned in section 4, is 'for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee,' &c.; not a word being said in that section, or in the order, about distribution. The order vesting the estate and effects in the assignees, whose duty it is to distribute, is, by force of law, an order for distribution. The statute not having given a form of plea, but merely describing the two main ingredients which the plea shall contain, viz., the petition and the vesting order, the pleader has more accurately described the order as an order for the protection of the person of the defendant from process, and for the vesting of his estate and effects in the assignee,—relying upon the known rule of pleading, which allows an instrument to be set out according to its legal effect. I there-

fore think the plea is sufficient." The first section of the 5 & 6 Vict. c. 116, gives the right to petition under certain circumstances, and empowers the commissioner to give the petitioner a protection from process; and it enacts, "that, upon the *presentation of any such *574] petition, all the estate and effects of the petitioner shall forthwith become invested in the official assignee, who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statutes relating to bankrupts." Under the bankrupt act, 1 & 2 W. 4, c. 56, ss. 22, 24, the official assignee holds in trust for distribution amongst the creditors. By the fourth section of the 5 & 6 Vict. c. 116, the mode of proceeding, when the petitioner is brought up for examination, is regulated; and the commissioner is empowered to make a final order for the protection of the person of the petitioner from process, and for the vesting of his estate and effects in an official assignee. That section does not, *per se*, neither does the order, vest the estate. [MAULE, J. What, then, is the meaning of making an order for vesting? Has there been in this case an order under the fourth section?] There has. [MAULE, J. Then why not plead it?] It has generally been assumed, that, when a statute gives a form of plea, it must be strictly pursued: it was so held, with reference to a plea under the 6 G. 4, c. 16, s. 126, in *Sheen v. Garratt*, 6 Bingh. 686, 4 M. & P. 525. That, however, is a fallacy: *Earl Spencer v. Swannell*, 8 M. & W. 154. It is enough if the words of the plea are substantially the same as those of the tenth section of the act. A general form of plea precisely following the words of that section has been held bad: *Fisher v. Gibbon*, 2 D. & L. 869. [Channell, Serjt. That *575] case is referred to, and disposed of in *Cook v. Henson*.] In **Tyler v. Shenton*, 15 Law Journ., N. S., Q. B. 204, Lord DENMAN says: "Very great latitude in pleading would seem to be given by the act of parliament, and the Court of Common Pleas have gone very far in holding the plea sufficient in *Cook v. Henson*. Without impugning that decision, it is sufficient to say that we are now asked to go still further, which we are not prepared to do." The form of order given by the recent act, 7 & 8 Vict. c. 96, s. 2, makes no mention of distribution.

Per Curiam. This is a plea by which the defendant seeks to discharge himself under the 5 & 6 Vict. c. 116. There can be no difficulty in framing such a plea. Either it must follow the precise words of the tenth section, or it must set out the whole of the proceedings, so as to show that the requisites of the statute have been duly complied with.

The plaintiff must have judgment, unless the plea be amended within a week.

The plea not having been amended, there was

Judgment for the plaintiff.

*DOE d. GRETTON and Another v. ROE. June 2. [*576

Quere, whether upon a motion for judgment against the casual ejector, under the 4 G. 2, c. 28, s. 2, an affidavit stating that an amount *exceeding half a year's rent* was in arrear, and that there was "no sufficient distress to be found upon the premises, countervailing the said arrears of rent then due," is sufficient: or whether the affidavit should state that the property upon the premises was insufficient to countervail *half a year's rent*.

Where judgment had been obtained upon an affidavit which the party was apprehensive might be held to be defective in this respect, the court allowed such judgment to be superseded, and another judgment to be signed, upon an amended affidavit.

Scumble, that no special ground for setting aside the first judgment was necessary.

UNDER the 4 G. 2, c. 28, s. 2, (a) judgment was obtained against the casual ejector, upon an affidavit stating, that, before the declaration was served, (b) there **was* due to Gretton, as landlord, from the tenant, [577 29l. 3s. 8d., for *more than half a year's rent* of the premises, under and by virtue of an indenture of lease; that no sufficient distress was then to be found upon the said premises countervailing *the said arrears* of rent then due; and that the lessors had power to re-enter by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid, &c.

T. Sanders now moved that the judgment might be superseded, and another judgment signed upon an amended affidavit, stating, that, before the declaration was served, there was due to Gretton, as landlord of the premises, from G. Fox, the tenant thereof, 29l. 3s. 8d., for more than a half-year's rent of the premises, under and by virtue of an indenture of lease, dated, &c., whereby the premises were demised to Fox for 25 years from, &c., at the yearly rent of 40l.; and that no sufficient distress was,

(a) Which enacts, "that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage, or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the casual ejector, or nonsuit for not confessing lease entry and ouster, it shall be made appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that *half a year's rent* was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing *the arrears then due*, and that the lessor or lessors in ejectment had power to re-enter; then, and in every such case, the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

(b) *Quere*, whether it should not also have been shown that the rent had become due *before the day of the demise*.

before the said service of the declaration, to be found upon the premises, *countervailing the sum of 20*l.*, being one half year's arrears of rent then due.* [MAULE, J. Why is not the first affidavit sufficient? Is it not enough, if the goods upon the premises are insufficient to countervail *all* the arrears then due?] The case of *Doe d. Powell v. Roe*, 9 Dowl. P. C. 548, (a) seems to show that it is not. There, the affidavit stated that a *year's* rent was in arrear, and that there was "no sufficient distress to be found on the premises to countervail *the arrears of rent:*" and COLBRIDGE, J., said: "That is not sufficient, as there may be a sufficient distress on the premises to countervail *half a year's* rent, although there is not sufficient to countervail a year's rent. Suppose five years' rent was due, the landlord *578] is not to *avail himself of the statute merely because there is not a sufficient amount of property to countervail the arrears to that extent. A landlord has no right to lie by for such a time, (b) and then seek thus to render the provisions of this statute available."

MAULE, J. Whatever be the true construction of the statute, I do not see why you should not have leave to set aside your own judgment, without assigning any reason for it.

The rest of the court (c) concurring,

Rule granted.

(a) The learned judge's attention was probably not called to the precise words of the statute, which appear to conclude the question.

(b) Suppose the rent to be payable yearly.

(c) Wilde, C. J., was absent.

HOPKINS v. PRESCOTT. June 2.

An agreement, whereby, —after reciting that A. had carried on the business of a law-stationer at G., and also had been sub-distributor of stamps, collector of assessed taxes, &c. there, and that he had agreed with B. for the sale of the said business, and of all his good-will and interest therein, to him, for the sum of 300*l.*,—A., in consideration of the said sum of 300*l.*, agreed to sell, and B. agreed to purchase, the said business of a law-stationer at G.; and whereby it was further agreed that A. should not at any time after the 1st of March then next, carry on the business of a law-stationer at G., or within ten miles thereof, or collect any of the assessed taxes, &c., but would use his utmost endeavours to introduce B. to the said business and offices,"—is illegal and void, as being a contract for the sale of an office, within the 5 & 6 Edw. 6. c. 16, and also within the 49 Geo. 3. c. 126.

ASSUMPSIT. The declaration stated, that, on the 8th of January, 1846, by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part,—after reciting that the plaintiff had, for a long time past, carried on the business of a law-stationer *579] at Gloucester, and also had been sub-distributor *of stamps, collector of assessed-taxes, and agent for the Birmingham Fire Office there, from which business he had annually received, on an average of five years, the sum of 200*l.*, and that the plaintiff, being desirous of giving up his said business, had agreed with the defendant for the sale of the same, and of all his good-will and interest therein, to him, at and for the sum of 300*l.*, in the manner thereafter mentioned,—it was witnessed, that, in consideration of the sum of 300*l.*, to be paid as therein-

after mentioned, the plaintiff did thereby agree to sell, and the defendant did thereby agree to purchase, all the said business of a law-stationer so carried on by the plaintiff, and all his good-will and interest therein, and in every part and branch thereof; and the defendant did thereby promise and agree to and with the plaintiff, that he, the defendant, would pay and secure to the plaintiff the said sum of 300*l.*, with interest, by certain notes of hand, &c., payable at stated periods, and in manner therein mentioned; and it was thereby further agreed by and between the plaintiff and the defendant, that the plaintiff should not at any time after the first day of March then next, carry on the business of a law-stationer, or *collect any of the assessed taxes*, or accept the office of an agent to any fire or life-assurance company at Gloucester, or within ten miles thereof, but would use his utmost endeavours, at the expense of the defendant, to introduce him, the defendant, to the said business *and offices*, as by the said agreement, &c.: that, the said agreement being so made, afterwards, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said agreement on his part, he, the defendant, undertook, and then promised the plaintiff, to perform the said agreement on his part: averment, that the plaintiff had always, from the time of making the said agreement, performed and fulfilled the same on his *part, and was afterwards, to wit, on the day and year first aforesaid, and [580 always from thence had been, ready and willing to accept and receive from the defendant the notes of hand, &c., as a security for the said 300*l.* and interest, in manner as in the agreement in that behalf provided, and had not at any time after the 1st of March, 1847, carried on the business of a law-stationer, or *collected any of the assessed taxes*, or accepted the office of an agent to any fire or life-assurance company within ten miles, &c., and had always, from the time of making the agreement, used his utmost endeavours to introduce the defendant to the said business *and offices*: Breach, that, although, after the making of the agreement, and before the commencement of the suit, to wit, on the 25th of December, 1846, the sum of 50*l.* became due and payable from the defendant to the plaintiff, according to the tenor of the agreement, yet the defendant had disregarded his said promise and agreement, and had not paid the last-mentioned sum, or any part thereof, &c.; and that, although a reasonable time in that behalf had elapsed, after the making of the agreement, and before the commencement of the suit, yet the defendant, further disregarding his said promise, had wholly neglected to secure the said sum of 50*l.*, or any part thereof, by note of hand or otherwise, &c.

Second plea,—that, before and at the time of making the supposed agreement and promise in the declaration mentioned, the plaintiff held, exercised, and enjoyed the office of sub-distributor of stamps, for, &c., the same then and still being an office touching and concerning the receipt of her majesty's revenue; and that, by the agreement so made

by the plaintiff as in the declaration mentioned, he the plaintiff did unlawfully, corruptly, and against the statute in that case made and provided, agree with the defendant to receive *and have from him *581] a certain sum of money, to wit, the money in the declaration mentioned, to the intent that he, the defendant, should have, exercise, and enjoy the last-mentioned office; and that thereby the supposed agreement was and is utterly void in law. Verification.

Replication—that the plaintiff did not, by the agreement in the declaration mentioned, agree with the defendant to receive or have from him the sum of money in the plea mentioned, to the intent that the defendant should have, exercise or enjoy the office in the plea mentioned, *modo et forma*—concluding to the country.

To a third plea, in terms similar to the second, substituting the words “collector of taxes,” for “distributor of stamps,” there was a similar replication.

To these replications there was a special demurrer: but the judgment of the court turned entirely upon the sufficiency of the declaration.

Hugh Hill, (with whom was *Badeley*.) in support of the demurrer. The contract declared upon is void, and the breach of it affords no ground of action. One of the considerations which induced the defendant to agree to purchase the business in question was, the engagement, on the plaintiff's part, not to carry on the business of a law-stationer at Gloucester, or within ten miles thereof; another, that the plaintiff would resign the office of collector of assessed taxes; and a third, that the plaintiff would use his utmost endeavours to introduce the defendant to the offices before mentioned, viz., amongst others, those of collector of assessed taxes, and sub-distributor of stamps. Now, it is perfectly clear, that, if any one provision in an agreement is in contravention of a statute, the whole contract is void. From the reign of Elizabeth to the present

*582] time *that has never been disputed. In *Lee v. Coleshill*, Cro. Eliz. 529, (a) in debt by Lee and wife, as executors of Smith, upon an obligation, against the defendant, as executrix of Coleshill, her husband, “the defendant pleaded the condition to be, for the performance of covenants within a certain indenture betwixt Smith on the one part, and Coleshill on the other part, whereby Coleshill, being customer of London, (by letters-patent,) made Smith his deputy in the said office, and covenanted to surrender those letters-patent before a certain day, and to procure new to himself and Smith; as also, that if Smith died, living C., that C. should pay to the executors of Smith 800*l.*: and shows the statute of 5 Edw. 6, c. 16, that all promises, bargains, and contracts for the buying of divers offices (whereof this is one) shall be void; and therefore the plaintiff demurred. *Glanvil* prayed judgment for the plaintiff; for, there be many covenants within the indenture, whereof

(a) S. C., *per nom. Smith v. Coleshill*, 2 And. 55, 107; cited in *Twynnes's case*, 3 Co. Rep. 82 b; and in Godb. 213; Sir F. Moore, 857; *Ley*, 2, 75, 79.

some are good and lawful, and for them, doubtless, the obligation remains good : for, although the statute makes the covenants concerning the buying of the office, and the obligation as to it, void, yet, for the other covenants therein recited, being lawful, the obligation continues in force. Vide 20 H. 6, c. 23, pl. 2, and 4 H. 7, fo. 12, pl. 8, that an obligation may be avoided in part, and stand good for the residue. *Drew, è contrâ.* All the parts here of this indenture concern the exercising of this office. And, if any of the covenants concerning other matters in the indenture should be accounted good, yet the obligation is void in all ; for, the statute saith the bond to that purpose shall be void. And then it is not possible it should be void to this intent, and be good for another. And it hath *been held in the Queen's Bench, if a person makes a lease [*583 which is void by the statute for non-residence, and there is an obligation for the performance of covenants ; although there be some covenants therein which do not concern the lease ; yet the bond is entirely void. Otherwise, all the meaning of the statute should be defrauded, by putting in a lawful covenant within the indenture. Wherefore the court here did not deliver any great opinion : but, *absente Walmsley adjournatur* : and it was afterwards adjudged that this obligation was void in every part, "being against law." To the same effect is *Norton v. Simmes*, Hobart, 12, where "a difference was taken between a bond made void by statute and by common law ; for, upon the statute 23 H. 6, cap. 9, if a sheriff will take a bond for a point against that law, and also for a due debt, the whole bond is void, for, the letter of the statute is so, for a statute is a strict law, but the common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand,—as is 14 H. 8, fo. 15." The statute 5 & 6 Edw. 6, c. 16, s. 2, enacts, "that, if any person or persons, at any time hereafter, bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, &c., for any office or offices, or for the deputation of any office or offices, or any part of any of them, or to the intent that any person should have, exercise, or enjoy any office or offices, &c., which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the *king's highness's treasure, money, rent, *revenue*, account, aulnage, [*584 auditorship, or surveying of any of the king's majesty's honours, castles, manors, &c., or any of the king's majesty's customs, or any other administration or necessary attendance to be had, done, or executed in any of the king's majesty's custom-house or houses ; or the keeping of any of the king's majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence ; or which shall

concern or touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered;—that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit, for any of the said office or offices, &c., or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit to be given for any of the said office or offices, &c., or any part of any of them, shall not only lose and forfeit all his and their right, interest and estate which such person or persons shall then have, of, in, or to any of the said office or offices, &c., or of, in, or to the gift or nomination of any of the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, or assurance to have or receive any fee, reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall immediately by and upon the same fee, money, or

*585] reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward, to be paid as is aforesaid, be adjudged a disabled person in the law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance, to give or pay any sum of money, fee, or reward.” And the third section enacts “that all and every such bargains, sales, promises, bonds, agreements, covenants, and assurances, as be before specified, shall be void to and against him and them by whom any such bargain, sale, bond, promise,

*586] covenant, or assurance, shall be had or made.” The 49 G. 3, c. 126, s. 3,(a) makes the purchase or sale of an office *within

(a) Which declares and enacts, “that, from and after the passing of this act, if any person or persons shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall, by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly,—and also if any person or persons shall purchase or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance, to give or pay any money, fee, gratuity, loan of money, reward, or profit, or shall, by any way, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly,—for any office, commission, place, or employment specified or described in the said recited act [5 & 6 Edw. 3, c. 16,] or this act, or within the true intent or meaning of the said act or this act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appoint-

the prohibition of the former statute, an indictable offence. A contract for the doing of a thing that is prohibited by a statute, or the doing of which subjects the party to a penalty, cannot be made the foundation of an action.(a) In 3d Inst. 154, it is said: "The king referred the case(b) unto Sir THOMAS EGERTON, lord chancellor of England, and to the chief justice of the King's Bench: Sir ROBERT VERNON, being coferer of the king's house, by reason of which office he hath the receipt and payment of 40,000*l.* of the king's treasure yearly, and payeth the wages beneath the stayres, &c., did bargain and sell the said office for a great sum of money, and for certain annuities to be paid, to Sir Arthur Ingram, knight. The first question was, whether the said office were void by force of the statute of 5 & 6 Edw. 6, c. 16. The second was, seeing the words of this act be,—'shall be adjudged a disabled person in law, to all intents and purposes, to have and occupy any such office,' &c.,—whether the king might dispense with that [disabled;] and, upon mature deliberation, and hearing of counsel learned, they resolved, and so certified the king, that the same office was void by the said bargain and sale, and that the king could not dispense with the said disability, for the reason and cause above-said.(c) [MAULE, J. That comes to nothing at all.] In *Huggins v. Bambridge*, Willes, 241, it was held that a contract with a warden of the Fleet, (who held only for life under the crown,) that, for a sum of money, he would surrender the office to the king, to the intent that he should procure from the *king a grant of the office to the purchaser, is void by the 5 & 6 Edw. 6, c. 16; and [*587 a bond given to secure the payment of such consideration money, cannot be enforced in a court of law. So, in *Layng v. Paine*, Willes, 571, it was held that a bond given by any of the officers mentioned in that statute, for securing all the profits of the office to the person appointing, was void: so, a bond given by such an officer, to surrender whenever the person appointing should choose. In *Parsons v. Thompson*, 1 H. Blac. 322, A., being possessed of an office in a dock-yard, B., in order to induce him to procure himself to be superannuated, and retire on the usual pension, agreed, (without the knowledge of the navy board, to whom the appointment belonged,) in case B. should succeed him, to allow him a certain annual share of the profits of the office: and it was held that no action could be maintained upon the agreement. And in *Garforth v. Fearon*, 1 H. Blac. 327, A., by the interest, and on the application of B., was appointed customer of a port, having previously signed an agreement, declaring that his name was used in the application, in trust for B., that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to

ment, nomination, or resignation,—then, and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor."

(a) Vide *Cundell v. Dawson*, ante, p. 376.

(b) Sir *A. Ingram's case*, 12 Jac. 1.

(c) And see Co. Lit. 234 a, 1 Tho. Co. Lit. 240.

his own use: upon the failure of A. to comply with the agreement, it was held that no action upon it would lie against him. So, in *Blackford v. Preston*, 8 T. R. 89, it was held that a sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the company, is illegal; and the contract of sale cannot be the foundation of an action. Lord KENYON there said:

"There is no rule better established respecting the disposition of every

*588] office in which the public are concerned, than this—**detur digniori*: on principles of public policy, no money consideration

ought to influence the appointment to such offices. This principle was much considered by the late Lord Chancellor THURLOW, in a case that came before him on an injunction bill, where a noble lord having, in consequence of his own office in the king's household, recommended another person to the appointment of another place in the household, and having made that recommendation in consideration of an annuity to be granted to a third person, not to himself, the contract was considered as illegal; and a perpetual injunction was granted to the party suing on that contract in a court of law.(a) Up to a certain extent, the legislature have interfered, and prohibited, by the statute 5 & 6 Edw. 6, c. 16, the sale of some offices: but, whether or not that act of parliament were necessary for the purpose, I will not now inquire." And LAWRENCE, J., said: "The short question here is, whether or not a contract entered into between two individuals, in direct violation of the orders of the East India Company, and against public policy, can be enforced in a court of justice. With regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute 5 & 6 Edw. 6, c. 16. This point was much considered in *Pargons v. Thompson*, where an officer in the dock-yard at Chatham agreed to give another officer there, a certain share of the profits, if the latter would procure himself to be superannuated, and retire on the usual pension, to make way for the former; and it was holden that such agreement, having been made without the knowledge of the navy board, to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy.

*589] There, a distinction was taken *between those offices that cannot be legally sold, and those that may be the object of sale, where the sale takes place under the authority and with the consent of those who have the power of appointment, as commissions in the army.(b) Now, the principle on which that case, and the cases there referred to, were decided, must govern the present, unless it can be shown that there is some distinction between offices held under the East India Company and those under government: but I think no such distinction can be established, as far as respects this purpose." [WILDE, C. J. In that case the party superannuated himself by fraud.] In *Stackpole v. Earle*, 2 Wils.

(a) See *Hansington v. Du Chatel*, 1 Bro. C. C. 124.

(b) Vide post, 597, n. (a).

188, a contract to pay a percentage for procuring one to purchase the office of surveyor of the baggage of the port of London, was held to be within the prohibition of the 5 & 6 Edw. 6, c. 16. [MAULE, J. There, the objection was taken upon the evidence, not upon the declaration.]

By the 55 G. 3, c. 184, s. 3, general powers are given to the commissioners of stamps to appoint all proper officers. The sub-distributor, —an officer expressly mentioned in the 56 G. 3, c. 58, s. 120, and in the 3 & 4 W. 4, c. 97, ss. 1, 3,—is appointed by the distributor.^(a) By the 3 G. 4, c. 88, provision is made for the appointment and regulation of collectors of land and assessed taxes. Both these are clearly offices within the 5 & 6 Edw. 6, c. 16.

Prentice, contra. The question is, whether the whole contract is void, because one branch of it may be within the prohibition of the statute of Edward. With the exception of *Parsons v. Thompson* and *Garforth v. Fearon*, all the cases cited on the part of the defendant were cases of bonds. In the case, however, of a deed which [*590] *contains several matters of contract that are capable of being severed, modern cases show that an illegality affecting one branch of it only, does not avoid the whole instrument. Thus, in *Doe d. Thompson v. Pitcher*, 6 Taunt. 359, it was held, that, if there be in a deed one limitation to an use which is a charitable use within the statute 9 G. 2, c. 36, that statute does not therefore avoid other limitations in the same deed, which are not within the act. "The deed," says GIBBS, C. J., "is argued to be void on three grounds. First, if it be void as to part, it is said, it must be void as to the whole. If the objection had been derived from the common law, it is admitted that would not be the consequence; but it is urged that the statute makes the whole deed void. As the counsel for the plaintiff puts it, there is no difference between a transaction void at common law, and void by statute: if an act be prohibited, the construction to be put on a deed conveying property illegally, is, that the clause which so conveys it, is void equally, whether it be by statute or common law: but it may happen that the statute goes further, and says that the whole deed shall be void to all intents and purposes; and, when that is so, the court must so pronounce, because the legislature has so enacted, and not because the transaction prohibited is illegal. I cannot find in this act any words which make the entire deed void. The words are, 'all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, or of any estate or interest therein, shall be absolutely and to all intents void.' I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void; but I think the statute makes nothing more void, and that the deed, so far as it passes other lands, not to a charitable use, is good. Therefore that argument [*591] fails." So, here, *the contract, so far as it relates to the sale

(a) See 56 Geo. 3, c. 56, s. 20. (Ireland.)

of an office, is void; but the rest may stand. The 17th section of the 26 G. 3, c. 60, required, that, upon any transfer of the property in a ship, the certificate of registry should be recited in the bill or other instrument of sale thereof; and that otherwise "such bill of sale should be utterly null and void to all intents and purposes." In *Kerrison v. Cole*, 8 East, 281, it was held, that, although a bill of sale for transferring the property in a ship by way of mortgage, may be void, as such, for want of reciting the certificate of registry therein, as required by the statute, yet the mortgagor may be sued upon his personal covenant, contained in the same instrument, for the re-payment of the money lent. The judgment of the lord chancellor, in *Bellamy v. Burrow*, Cas. temp. Talbot, 97, shows that the object of the statute was, to restrain corrupt agreements, and to avoid them, as between the grantor and grantee. [MAULE, J. To avoid them generally.] The real subject-matter of the agreement here, is, the sale of the business of a law-stationer. All the rest is collateral. The declaration would have been perfectly good, at least on general demurrer, if the mutual promises had been wholly omitted. The plaintiff was not bound to set out the whole agreement. [WILDE, C. J. He was bound to set out the whole consideration for the defendant's promise.] Suppose this had been a contract for the sale of two distinct businesses, upon separate considerations, might not the contract have been good as to one, although, as to the other, it might have been bad? [WILDE, C. J. No doubt, you may put two distinct and independent contracts upon one piece of paper. But here, the consideration alleged is an entire one.] It is nowhere alleged in this declaration, that the plaintiff was, at the time of the contract, sub-distributor of stamps *or collector of assessed taxes; but merely that he *had* been so. *592] [CRESWELL, J. He undertakes, by the agreement, not to collect any of the assessed taxes after a certain day.] The court will intend nothing to make the declaration bad. Nor will they assume, as it is not averred, that the plaintiff had been a collector appointed under the assessed-taxes acts.

Badeley, in reply. The court will take notice of assessed taxes, and that there are no other collectors than those mentioned in the acts. The consideration alleged in the declaration is clearly not severable, and is on the face of it illegal. The plaintiff had no right to contract to deprive the crown of the benefit of his services as collector. (a) All contracts which are contrary to public policy are void; *Law v. Law*, 3 P. Wms. 391, *Norton v. Simmes* and *Pearson v. Humes*, Carter, 229, (b) show that there is a distinction between contracts partially void at common law, and those which are declared void by statute. In *Chitty on Contracts*,—referring to *Law v. Hodson*, 11 East, 800, *Forster v. Tay-*

(a) And see *Pelham's case*, 4 Leonard, 33.

(b) In *Pennoyer v. Brace*, Cornberbach, 441, Lord Holt disclaimed all knowledge of "that Carter," and would not allow his authority.

lor, 5 B. & Ad. 887, and several other cases of that class,—it is said (a) that “it may be laid down as a general rule, that, where a contract, be it express or implied, is expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect.” Upon the fair construction and intendment of the contract as stated in this declaration, it does appear that the plaintiff was collector of taxes at the time it was entered into. [MAULE, J. The plaintiff distinctly avers that he had always, from the time of making the agreement, performed and fulfilled the same on his part, and had not at any time since the 1st of March, *1847, collected any of the assessed taxes.] [*593] For any thing that appears, the entire agreement is set out in the declaration. [WILDE, C. J. The court will intend that the whole consideration for the payment of the money is stated.]

WILDE, C. J. I am of opinion that the defendant in this case is entitled to judgment, on the ground that the declaration does not disclose a good cause of action. It is, therefore, unnecessary to discuss the sufficiency either of the plea or of the replication.(b) The declaration sets out an agreement; and one question is, whether it sets out an agreement which is single and entire, made on one entire consideration, or one that is severable in its nature, and deals with matters that are unconnected with, and independent of, each other. It seems to me that the matter alleged in the declaration amounts to one entire agreement,—which may very well be, although the contract be to perform several distinct things. By the agreement, as set out in the declaration,—which begins with reciting that the plaintiff had for a long time past carried on the business of a law-stationer, and also had been sub-distributor of stamps, collector of assessed taxes, and agent for the Birmingham Fire Office, and that the plaintiff, being desirous of giving up his said business, had agreed with the defendant for the sale of the same, and of all his good-will and interest therein, to him, for the sum of 800*l.*,—it was witnessed, that, in consideration of 800*l.*, the plaintiff agreed to sell, and the defendant to purchase, all the said business of a law-stationer so carried on by the plaintiff, and all his good-will and interest therein, and in every part and branch thereof: and the defendant promised and agreed to pay the 800*l.*, at certain periods; and it was further agreed “that the *plaintiff should not, at any time after the 1st of March then next, carry on the business of a law-stationer, or collect any of the assessed taxes, or accept the office of an agent to any fire or life-assurance company, within ten miles of Gloucester, but would use his best endeavours to introduce the defendant to the said business and offices,” that is, the business of a law-stationer, and the offices of sub-distributor of stamps, collector of assessed taxes, and agent to the Birmingham Fire Office. The declaration then proceeds to allege that

(a) 3d edit. p. 417.

(b) The argument upon them has therefore been omitted.

"the said agreement being so made, afterwards, *in consideration thereof*,"—from which words, it seems to me that it must necessarily be inferred that the agreement in all its several parts formed the consideration for the defendant's promise, there being no rational ground for saying that one of the things mentioned in the agreement formed the consideration in preference to the others,—“and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said agreement on his part, he, the defendant, undertook and then promised the plaintiff to perform the said agreement on his part.” It then proceeds to aver,—in a manner not, perhaps, very material, except as showing what the pleader, who would hardly have averred the performance of that which he considered to be *dehors* the contract, understood to be the agreement between the parties,—“that the plaintiff had always, from the time of making the agreement, performed and fulfilled the same on his part, and was afterwards, to wit, on, &c., and always from thence hitherto had been, ready and willing to accept and receive from the defendant the securities for the 300*l.* in manner as in the agreement provided, and had not at any time after or since the said 1st of March, 1847, carried on the business of a law-stationer, or collected any of the assessed taxes, or accepted the office of an agent to any fire or life-assurance company, within ten miles of *Gloucester, and had always, *595] from the time of making the said agreement, used his utmost endeavours to introduce the defendant to the said business *and offices*.” And it then alleges a breach, in the non-payment of one of the instalments. Looking at this agreement, it appears to me that it is one entire and indivisible contract, founded upon one entire consideration.

If, then, the contract declared on is entire, the next question is, to what does it relate? The subject-matter of the agreement, in addition to the sale of the business of a law-stationer, is, that the plaintiff will, for certain reward, resign the offices of collector of assessed taxes and sub-distributor of stamps, and use his best endeavours to procure the defendant to be appointed to those offices. The question is, whether these are offices within the statute 5 & 6 Edw. 6, c. 16. It is said that the court cannot take notice of the office of “collector of assessed taxes.” He is, however, an officer appointed, under certain acts of parliament, of which we must take notice, to an office connected with the receipt of the revenue. The office of sub-distributor of stamps, likewise, is an office of the same description. Both are within the 5 & 6 Edw. 6, c. 16, the third section of which avoids all contracts for the sale or purchase of the several offices mentioned in the second section. We need not, therefore, look beyond the provisions of that statute, to see that the contract declared on in this case cannot be made the foundation of an action. The 49 G. 3, c. 126, s. 3, however, carries the matter still further, by making the transactions prohibited by the statute of Edward, misdemeanors. The effect of both statutes is, that this agreement is utterly void.

COLTMAN, J. I am entirely of the same opinion. The contract cannot be broken up in the manner suggested. It is one entire contract, and the defendant could not be called upon to pay, except upon the performance by the *plaintiff of the whole consideration. If any part of the consideration is void, the money cannot be recovered. [*596 Reading this declaration, as I think we are bound to read it, according to the plain common sense of the words used, I find a part of the consideration to be the covenant on the plaintiff's part to recommend the defendant to an office relating to the collection of her majesty's revenue,—which is precisely within the prohibition of the 5 & 6 Edw. 6, c. 16. It has never been held that that statute applies only to one who has power himself to appoint to the office which is the subject of the bargain. In *Law v. Law*, which is a leading authority, the party had no such power: he only engaged to use his influence with the commissioners. If this contract were not made void by the statute, I still think it would be void at common law, upon the principle laid down by Lord THURLOW, on granting a perpetual injunction in *Haneington v. Du Chatel*, 1 Bro. C. C. 124,(a) viz., that contracts for the sale of offices of this sort, are contrary to public policy.

MAULE, J. I also think the declaration is bad, on the ground that it discloses a contract made void by the statute 5 & 6 Edw. 6, c. 16. The second section prohibits the taking any money or agreement for money or reward, to the intent that the party paying or agreeing to pay the money should have or exercise any office, amongst others, relating to the receipt or controlment of the revenue; and the third section makes the contract absolutely null and void. The agreement now in question, in substance is, that the defendant shall pay the plaintiff 300*l.*, to the intent that the former shall have and exercise the offices of sub-distributor of stamps, and collector of assessed taxes,—both clearly offices within the direct prohibition of the statute. The agreement bears evident traces of an intention to evade *that act. It is said, that this is stated as a *further* agreement, and that, rejecting that [*597 part of the agreement, which relates to the offices of sub-distributor of stamps and collector of assessed taxes, and also the mutual promises, enough would remain to support the action. But I think we are not at liberty either to reject the mutual promises, or so to sever the agreement. It is by no means clear that the declaration would be good if the mutual promises were omitted. It would be an irregular declaration in assumpsit. If the omission had the effect of severing the agreement, it would give to the declaration an effect totally different from the intention of the parties. We cannot reject words, the omission of which would alter the sense. The defendant contracted to pay the 300*l.* in consideration of *all* that the plaintiff contracted to do on his part.

CRESSWELL, J. I agree with the rest of the court in thinking this

declaration bad. It is impossible to look at the agreement set out, without seeing that the object of the parties was, the sale of the offices in question. Upon the face of the declaration there is no right of action.

Judgment for the defendant.(a)

(a) For cases within the statute of Edward, see *Dr. Trevor's case*, (Chancellorship of a diocese,) 12 Co. Rep. 78, Cro. Jac. 269; *Woodward v. Fezly*, (Archdeacon's registership,) 3 Lev. 289, 2 Vent. 187; *Law v. Law*, (Supervisors of excise,) 3 P. Wms. 391, Cases temp. Talb. 140; *Morris v. McCulloch*, (Commission in the marines,) Ambler, 432.

For cases *not* within the statute of Edward, see *Godbolt's case*, (Office of bailiff of a hundred,) 4 Leon. 33; *Ellis v. Riddle*, (Office held *in fee*, and demises thereof,) 2 Lev. 151, Precedents in Chancery, (Commission in the army,) 99.

*598] *LOGAN v. HALL and Another. June 4.

A. being a lessee of a messuage under the corporation of London, demised it, in 1829, to B, C., and D., for twenty-one years; the lessees covenanting to repair, and to insure "in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster, as B, C., and D. (the lessees,) their executors, &c., should think fit;" with a proviso for re-entry for breach of any of the covenants. In 1835, C., by indenture, granted an underlease to E. and F., for the residue of the term, wanting one day; the underlease containing the like covenants to repair, and to insure "in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable fire insurance office in London or Westminster as E. and F., their executors, &c., should think fit;" and also a proviso for re-entry for breach of any of the covenants.

The messuage being out of repair, and uninsured, the executors of A., in 1843, brought ejectment, and recovered possession:—*Held*, that C. was not entitled to recover against E. and F. the value of his reversionary interest,—the loss thereof not being the result of *their* breaches of covenant, but of the breaches of covenants by C., to which covenants they were no parties.

Held also, that the execution by the defendants of the indenture of underlease, and payment of rent thereunder to C., was sufficient evidence for the jury that C. was solely entitled to the reversion expectant upon the determination of the underlease.

COVENANT. The declaration stated, that before and at the time of the making of the indenture thereafter mentioned to have been made between the plaintiff of the one part, and the defendants and one H. Moulton, since deceased, of the other part, the plaintiff was lawfully possessed of the messuage and premises thereafter mentioned to have been demised by that indenture, for the residue of a certain term of years, to wit, the term of twenty-one years, from the 25th of March, 1829, and which term of years had been and was created by a certain indenture, theretofore, to wit, on the 7th of July, 1829, made between one J. D. Middleton of the one part, and one T. Kinnear, the plaintiff, and one S. F. Campbell, of the other part,—profert,—whereby it was witnessed, that, for the considerations therein mentioned, Middleton did

*599] demise and lease unto Kinnear, the plaintiff, and Campbell, *the said messuage and premises, the same being situate in the parish of St. Mary Woolnoth Haugh, in the city of London; *habendum*, to Kinnear, the plaintiff, and Campbell, their executors, administrators, and assigns, from the 25th day of March then last past, for and during the

said term of twenty-one years, at the yearly rent of 175*l.*, payable quarterly: [The declaration then set out covenants in that indenture, on the part of the lessees, to pay the yearly rent, together with all taxes, &c.: and to repair and to insure the premises from loss or damage by fire; and also a general proviso for re-entry on non-payment of rent, or breach of all or any of the covenants; a covenant on the lessor's part, to pay the rent reserved by the lease under which he held the premises, unto the mayor, commonalty, and citizens of the city of London, when and as the same should become due and payable; and also a covenant for quiet enjoyment:] that the defendants and Moul, at the time of the making of the indenture thereafter next mentioned, had notice of the premises: that, the plaintiff being so possessed of the said messuage and premises in the indenture, so alleged to have been made, to wit, on the said 7th of July, 1829, as aforesaid, mentioned, for the residue of the said term of twenty-one years, subject to the several covenants and to the proviso thereinbefore mentioned, theretofore, to wit, on the 30th of April, 1835, by a certain other indenture then made, in the lifetime of Moul, since deceased, between the plaintiff of the one part, and the defendants and Moul of the other part,—profert of the counterpart of the indenture,—it was witnessed, that, for the considerations therein mentioned, the plaintiff did, by the last-mentioned indenture, demise unto the defendants and Moul, the said messuage and premises, with the appurtenances; *habendum*, to the defendants and Moul, their [*600
*executors, &c., from the 25th of March then last past, for the term of fifteen years, wanting one day, from thence next ensuing, at the yearly rent of 315*l.*, payable quarterly: [The declaration then set out covenants in the last-mentioned indenture, on the part of the defendants and Moul, to pay the rent, together with all taxes, &c.; to repair and to insure the premises; not to permit certain trades to be carried on therein; and also a proviso for re-entry on non-payment of rent, or breach of all or any of the covenants; and also a covenant for quiet enjoyment, and a covenant on the part of the plaintiff to indemnify the defendants and Moul, their executors, &c., against the rent reserved by the lease of the 7th of July, 1829:] that, by virtue of the last-mentioned indenture, the defendants and Moul afterwards, to wit, on, &c., entered into and upon all and singular the demised premises, with the appurtenances, and became and were possessed thereof, for the said term so to them granted as aforesaid. The declaration then averred a breach by the defendants, after the death of Moul, of their covenants to repair and insure; and alleged, that, by reason and in consequence of the said messuage and premises being so out of repair, and in such state and condition as aforesaid, and also by reason of the said messuage and buildings not having been so insured against loss or damage by fire, and having been so uninsured as aforesaid, the said term by the said indenture so alleged to have been made, to wit, on the 7th of July, 1829, as

aforesaid, granted, became and was forfeited,(a) and one W. Middleton and S. Middleton, then being the executors of the last will and testament of the said J. D. Middleton, then deceased,—and which said J. D. Middleton, at the time of the making of the last-mentioned indenture, *601] was lawfully possessed of the *demised premises for the residue and remainder of a certain term of years exceeding the said term of years by the last-mentioned indenture granted,—afterwards, and before the commencement of this suit, to wit, on the 23d of May, 1843, entered into and upon the premises by the last-mentioned indenture demised, and then avoided, determined, and put an end to the said term so granted by that indenture as aforesaid, [*and afterwards, to wit, on the day and year last aforesaid, commenced a certain action of ejectment in the name of John Doe, as the nominal plaintiff, and prosecuted the same in the court of our lady the queen before the queen herself, for the recovery of the said demised premises; and that such proceedings were thereupon had, that afterwards, and before the said term of years so granted by the said indenture of lease alleged to have been made, to wit, on the 7th of July, 1829, as aforesaid, and before the said term of years so granted by the said indenture of lease alleged to have been made as aforesaid, to wit, on the 30th of April, 1835, or either of them, had expired by effluxion of time, and before the commencement of this suit, judgment was obtained in the said action of ejectment, and, to wit, on the 8th of July, 1843, the said demised premises were taken possession of by, and possession thereof was given and delivered to, the said W. Middleton and S. Middleton, under and by means of a certain writ of possession in that behalf, issued out of the said court of our said lady the queen before the queen herself, and afterwards executed,*(b) and *602] by means of the *premises the said term of twenty-one years by the said indenture so alleged to have been made, to wit, on the 7th of July, 1829, as aforesaid, granted, became and was wholly determined and at an end, and the reversion of the plaintiff of and in the demised premises, expectant on the determination of the said term by the said indenture so alleged to have been made on the 30th of April, 1835, as aforesaid, granted, became and was wholly destroyed and lost to the plaintiff; and also thereby the plaintiff lost the rent so reserved by the last-mentioned indenture; and the term so granted to the defendants and Moulton as aforesaid also became and was wholly at an end and determined, a long time, to wit, six years and upwards, before the time when the same would have expired by effluxion of time; and that, by

(a) Q. d. a right of re-entry accrued.

(b) The words between the two marks [*] appear to be surplusage. Whether the re-entry of the Middletons was made by them personally, or was effected by the agency of the sheriff put in motion by an *habere facias*, would be immaterial. Until actual entry, either by the reversioners or by the sheriff acting for their nominal lessee, the proceedings in ejectment would be *res inter alios acta*; and, after such entry, they would be not only so, but also wholly superfluous.

means of the several premises, the plaintiff in this suit lost and was deprived of the term so granted by the indenture so alleged to have been made on the 7th of July, 1829, as aforesaid, the same then being of great value, to wit, of the value of 2000*l.*, and also of profits to a large amount, to wit, 2000*l.*, which, but for the premises, and if the said term of twenty-one years had not been determined and put an end to as aforesaid, might and would have arisen and accrued to him from the demised premises, by reason of his having demised the same to the defendants and Moulst as aforesaid, at and for a greater annual rent than the annual rent at and under which the plaintiff held, and was entitled to, the demised premises for the said term of twenty-one years; and also, by means of the premises, the plaintiff lost and was deprived of, and was prevented from becoming entitled to, and obtaining, gains and profits to a large amount, to wit, 2000*l.*, which but for the premises he might and would have become entitled to and obtained from and by means of the demised premises; and thereby, and otherwise, the plaintiff had been and was greatly injured and damnified, &c.

*The following particular of breaches was delivered pursuant to a judge's order:—"The above-named plaintiff, on the trial [*603 of this cause, will not rely upon any breaches of covenant committed after the 23d of May, 1843, and will not seek to recover any damages beyond the value of the reversionary interest mentioned in the declaration."

After oyer of the two indentures, the defendants pleaded payment of 1*s.* into court, averring that the plaintiff had not sustained damages to a greater amount; verification, and prayer of judgment *si ulterius*, &c.

Replication of damages to a greater amount than 1*s.* in respect of the causes of action in the declaration mentioned—concluding to the country.

Issue thereon.

At the trial, before TINDAL, C. J., at the sittings for London after Michaelmas term, 1846, a verdict was found for the plaintiff, damages 840*l.*, subject to the opinion of the court upon the following case:—

By indenture made and dated the 7th of July, 1829,—hereinafter referred to as "the lease to the plaintiff and others,"—between J. D. Middleton of the one part, and T. Kinnear, R. Logan, (the plaintiff,) and S. F. Campbell, of the other part, Middleton demised a messuage to Kinnear, Logan, and Campbell for twenty-one years from the 25th of March, 1829, at the yearly rent of 175*l.*, payable quarterly, on the 24th of June, 29th of September, 25th of December, and 25th of March in every year,—the first payment thereof to be made on the 29th of September then next ensuing.

This lease contained the following covenants on the part of the lessees, to repair, and to insure:—

"And the said T. Kinnear, R. Logan, and S. F. Campbell, for themselves, their heirs, executors, administrators, and assigns, do hereby

*604] covenant with the said J. *D. Middleton, his executors, administrators, and assigns, in manner following, that is to say, that they the said T. Kinnear, R. Logan, and S. F. Campbell, their executors, administrators, and assigns, shall and will, from time to time, and at all times during the term hereby granted, at their own proper costs and charges, well and sufficiently repair, uphold, support, sustain, maintain, amend, and keep in good and sufficient repair, with good, sound, and well-seasoned oaken timber, and such other materials as in and by the acts of parliament for re-building the city of London, are appointed to be used in all buildings within the said city, and the liberties thereof, and with all other needful and necessary reparations, the said messuage and premises hereby demised, and all other erections and buildings which shall, at any time or times during the term hereby granted, be erected or built upon the premises hereby demised, or any part thereof; and shall and will cause the pavements to be paved, and the privies and wy-draughts belonging, or which shall belong, to the said premises, to be repaired, emptied, scoured, cleansed, and amended, at all times when needful :”

“And also that they, the said Kinnear, Logan, and Campbell, their executors, administrators, and assigns, shall and will, on the 25th day of March, 1831, at their own proper costs and charges, insure and keep insured the said messuage and premises and buildings hereby demised, and all such other erections and buildings as shall be then or thereafter erected and built in or upon the said premises, or any part thereof, from loss or damage by fire, in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable fire-insurance office in London or Westminster, as the said Kinnear, Logan, and Campbell, their executors, administrators, or assigns, shall think fit and proper, and keep the same so insured during the *continuance
*605] of the term hereby granted, and shall and will, upon the request of the said J. D. Middleton, his executors, administrators, or assigns, or his or their steward or agent, produce the receipt for the premium and duty for the then current year; and shall and will, so often as such messuage and buildings, or any part thereof, shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the surveyor of the said J. D. Middleton, his executors, administrators, or assigns.”

And the said lease to the plaintiff and others, also contains the following proviso for re-entry :—

“Provided always, that, if the said yearly rent or sum of 175*l.* shall be behind or unpaid, in part or in the whole, by the space of thirty days next after any of the days of payment on which the same ought to be paid as aforesaid, and the same shall be demanded upon, or at any time after the expiration of the said thirty days; or, if the said Kinnear, Logan, and Campbell, their executors, administrators, or assigns,

shall do, or omit to do, any act, matter, or thing whatsoever in breach or non-performance of all or any of the covenants and clauses herein contained, and on the part and behalf of them the said Kinnear, Logan, and Campbell, their executors, administrators, and assigns, to be observed, performed, fulfilled, and kept, then, and in all or any of such cases, it shall be lawful to and for the said J. D. Middleton, his executors, administrators, or assigns, into and upon the said messuage and premises hereby demised, or into or upon any part thereof in the name of the whole, wholly to re-enter, and the same to have again, re-possess, and enjoy as in their first and former estate, and the said Kinnear, Logan, and Campbell, their executors, administrators, or assigns, and all other tenants and occupiers of the said messuage and premises, thereout and from thence utterly to expel, put *out, and amove, [*606 notwithstanding."

The above-mentioned indenture is the indenture of the same date mentioned in the declaration.

By an indenture,—which is hereinafter described and referred to as and by the description of "the lease to the defendants,"—made and dated the 30th of April, 1835, between the plaintiff, Logan, of the one part, and the defendants and Moulton of the other part, Logan demised the said messuage and premises to the defendants and Moulton for the term of fifteen years from the 25th of March then last, wanting one day, (which term would expire on the 24th of March, 1850,) at the clear yearly rent, during that term, of 315*l.*, payable quarterly. This lease contains the following covenants by the lessees therein, to repair and to insure:—

"And the said G. Hall, J. Fernley, and H. Moulton do hereby, for themselves jointly, and each of them doth hereby for himself severally, and for his respective heirs, executors, and administrators, covenant with the said R. Logan, his executors, administrators, and assigns, that they the said Hall, Fernley, and Moulton, their executors, administrators, or assigns, shall and will, from time to time, and at all times during the term hereby granted, at their, or some or one of their, own proper costs and charges, well and sufficiently repair, uphold, support, sustain, maintain, amend, and keep in good and sufficient repair, with good, sound, and well-seasoned oaken timber, and such other materials as in and by the acts of parliament for re-building the city of London, are appointed to be used in all buildings within the said city and the liberties thereof, and with all other needful and necessary reparations, the messuage and premises hereby demised, and all other erections and buildings which shall, at any time or times during the term hereby granted, be erected or built upon the *premises hereby demised, or any part thereof, [*607 and shall and will cause the pavements to be paved, and the privies and wydraughts belonging or which shall belong to the said

premises, to be repaired, emptied, scoured, cleansed, and amended, at all times when needful."

"And also that they the said Hall, Fernley, and Moulton, their executors, administrators, and assigns, shall and will forthwith, at their own proper costs and charges, insure and keep insured, the messuage and building hereby demised, and all such other erections and buildings as now are, or hereafter shall be, erected and built in or upon the said premises, or any part thereof, from loss or damage by fire, in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable fire-insurance office in London or Westminster as the said Hall, Fernley, and Moulton, their executors, administrators, or assigns, shall think fit and proper, and keep the same so insured during the continuance of the term hereby granted, and shall and will, upon the request of Logan, his executors, administrators, or assigns, and of the superior landlord or landlords of the said premises, and his or their steward or agent, produce the receipt for the premium and duty for the then current year; and also shall and will, so often as such messuage and building, or any part thereof, shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the surveyor of Logan, his executors, administrators, or assigns, or of the superior landlord or landlords of the said premises."

And the said lease to the defendants and Moulton contains also the following proviso for re-entry:—

"Provided always, that, if it shall happen that the said yearly rent or sum of 315*l.* shall be behind and unpaid, in part or in the whole, by the space of thirty *days next after any of the said days of payment on which the same ought to be paid as aforesaid, and the same shall be demanded upon, or at any time after, the expiration of the said thirty days, or if the said Hall, Fernley, and Moulton, their executors, administrators, or assigns, shall do, or omit to do, any act, matter, or thing whatsoever, in breach or in non-performance of all or any of the covenants and clauses herein contained, on the part and behalf of them the said Hall, Fernley, and Moulton, their executors, administrators, and assigns, to be observed, performed, fulfilled, and kept, then and in all or in any of such cases, it shall be lawful to and for the said R. Logan, his executors, administrators, or assigns, into and upon the said messuage and premises hereby demised, or into or upon any part thereof in the name of the whole, wholly to enter, and the same to have again, repossess, and enjoy, as in his or their first and former estate, and the said Hall, Fernley, and Moulton, their executors, administrators, and assigns, and all other tenants and occupiers of the said messuage and premises, thereout and from thence utterly to expel, put out, and amove, this indenture, or any thing therein contained, to the contrary, notwithstanding."

This last-mentioned indenture is the indenture of the same date, mentioned in the declaration.

Before and at the time of the making of the said lease to the defendants and Moulton, their solicitors, by whom on their part the business of the settling and execution of the lease to the defendants was transacted and attended to, had notice of the said lease to the plaintiff and others, and of the contents thereof.

[The case then set out certain negotiations between the plaintiff's solicitors and the defendants' solicitors, as to the form of the covenant of indemnity, which was ultimately framed by consent as it now stands.]

*After the death of Moulton, and during the continuance of the term granted by the said lease to the defendants, the defendants neglected to repair the said messuage and premises, and suffered the same to be, and the same were, out of repair, as alleged in the declaration, and permitted, and were guilty of, such breach as in the declaration mentioned, of their said covenant to repair the said messuage and premises: and, after the death of Moulton, and during the continuance of the term granted by the said lease to the defendants, and before the determination of the last-mentioned term, and before determination of the term granted by the said lease to the plaintiff and others, as hereinbefore mentioned, the defendants, for a period of eight days, viz., from the 10th until the 17th of April, 1843, both inclusive, omitted and neglected to insure or keep insured the said messuage and premises from loss or damage by fire; and the said messuage and premises during all that time were not insured from loss or damage by fire. [*609]

In consequence of the said messuage and premises being out of repair and uninsured during the time in which they are above-mentioned to have been out of repair and uninsured, the term granted by the said lease to the plaintiff and others became and was forfeited; (a) and W. Middleton and S. Middleton, then being the executors of the last will and testament of the said J. D. Middleton, then deceased,—and which said J. D. Middleton, at the time of the making of the said lease to the plaintiff and others, was lawfully possessed of the said premises for the remainder of a certain term of years exceeding the term of years granted by the said lease to the plaintiff and others,—afterwards, and before the commencement of the suit, and on the 23d of May, 1843, and six years and upwards before the said term *granted to the defendants would have expired by effluxion of time, commenced an action of ejectment, (b) in the name of John Doe, as the nominal plaintiff, and prosecuted the same in her majesty's Court of Queen's Bench, for the recovery of the said messuage and premises; and such proceedings were thereupon had, that afterwards, and before the said term of years granted by the said lease to the plaintiff and others and the said lease to the

(a) The accrual of a right of re-entry, having nearly the same effect as a legal forfeiture, is popularly called a forfeiture.

(b) Vide supra, 601, n.

defendants, or either of those terms, had expired by effluxion of time, and before the commencement of this suit, and on the 4th of July, 1848, judgment was obtained in the said action of ejectment; and, on the 8th of the same month of July, the said messuage and premises were taken possession of, and possession thereof was given and delivered to the said W. Middleton and S. Middleton, under and by virtue of a writ of possession in that behalf issued out of the said Court of Queen's Bench, and afterwards executed: and, by means of the said ejectment, (a) the said term of twenty-one years granted by the said lease to the plaintiff and others, became and was wholly determined and at an end; and the reversion of and in the said messuage and premises, expectant on the determination of the said term granted by the said lease to the defendants, became and was wholly destroyed and lost.

At the trial of this cause, the defendants' counsel objected that the plaintiff could not recover on the issue joined, without proof that the term created by the lease to the plaintiff and others, had vested *solely* in the plaintiff; and contended that there was no evidence to go to the jury, that the term had so vested.

And the defendants' counsel further contended, that, upon the facts of the case, the plaintiff was not, in any event, entitled to succeed on *611] the issues joined, or to recover *damages beyond the sum paid into court, inasmuch as the defendants were not shown to have entered into a covenant of indemnity against the consequences of breaches of covenants entered into on the part of the lessees in the said lease to the plaintiff and others: and the said counsel contended that the defendants were not liable for damages sustained by, or arising from, breaches of covenants entered into by the plaintiff and others in the said lease to them: and the said counsel contended that the damages claimed at the trial by the plaintiff, were damages arising from breaches of covenants entered into by the plaintiff and others in the said lease to them: and the defendants' counsel further contended, that, even if the plaintiff were entitled to recover more than the sum paid into court, yet he would not be entitled to damages in respect to any loss of rent expected to accrue to the plaintiff,—if the lease to the defendants had not been determined before the period of its effluxion by time,—after the 25th of December, 1849, inasmuch as the rent was reserved payable to the plaintiff, during the term, on the 25th of March and other usual quarterly days, but the term would, by effluxion of time, have expired on the 24th of March, 1850.

It was proved at the trial, that the then value of a quarter's rent payable on the 25th of March, 1850, was half of its nominal amount; and, accordingly, the jury included in the damages found by them, a sum of 39*l.* 7*s.* 6*d.* in respect of the alleged loss of such quarter's rent.

(a) Vide *supra*, 601, n.

The damages found were in respect of the alleged loss of reversionary interest.

Copies of the pleadings, and of the two leases, accompany, and are to be deemed part of, the case.

The questions for the opinion of the court are—whether the plaintiff is, under the circumstances above *stated, entitled to recover damages beyond the sum paid into court. If the court shall be [*612 of opinion that the plaintiff, under the circumstances above stated, is not entitled to greater damages than the said sum paid into court, then a verdict shall be entered for the defendant; otherwise, the verdict is to stand for the plaintiff, for such sum as the court shall think proper, unless the court shall be of opinion that the plaintiff ought, at the trial, to have proved that the term of years created by the lease to the plaintiff and others, had become wholly vested in himself, and shall be of opinion, that, on the facts stated, there was no evidence to go to the jury that the said term had so vested; in which case, the verdict is to be set aside, and a new trial granted, as for misdirection of the learned judge.

Bramwell (with whom was *Peacock*) for the plaintiff.(a) There is abundant evidence on the face of the case that the reversion expectant on the determination of the lease of the 30th of April, 1835, vested solely in the plaintiff. The defendants executed that lease with notice of the lease under which the plaintiff held, and they have paid rent. The covenants in that *lease having been broken by the defend- [*613 ants, there can be no reason why the plaintiff should not recover against them the damage he has sustained in consequence. It will be said, on the other side, that the damage sustained by the plaintiff is not the inevitable and necessary consequence of the defendants' breaches of covenant. Suppose that the superior landlord, instead of availing himself of his right to re-enter, had brought an action against the plaintiff on his covenant, could it be said that the plaintiff could only have recovered nominal damages against the present defendants? The fallacy lies in the notion that special damage cannot be recovered, unless it be the sole inevitable result of the defendants' breach of covenant. In all cases there is some extraneous circumstance that occasions the damage. There is no inflexible rule of law as to what shall or shall not be recoverable as special damage: each case must depend upon its own peculiar circum-

(a) The points marked for argument on the part of the plaintiff, were—That he was entitled, under the circumstances stated in the case, to recover the 840*l.* damages, for which the jury found a verdict for him, or such other sum as the court might be of opinion that he was entitled to recover, as the value of the reversionary interest which he lost under the circumstances mentioned in the case; and that it was not necessary for the plaintiff to adduce at the trial any evidence to prove that the term of years granted by the lease in the case described as "the said lease to the plaintiff and others," had become vested in the plaintiff alone; but that, if the court should be of opinion that it was necessary for the plaintiff to adduce such evidence at the trial, then the plaintiff would contend and insist that there was, upon the facts, and under the circumstances stated in the case, evidence to go to the jury that such term had become vested in the plaintiff alone.

stances. This indenture is an arrangement between the parties, that the one shall enjoy the premises for a given period, and shall pay certain sums of money to the other. Every covenant is framed with a view to the carrying out of that object, or to afford the lessor a full and complete indemnity for the lessees' failure. [MAULE, J. Does a man who covenants to insure do more than covenant to increase his own solvency?] A court of equity would compel the application of the specific sum to the rebuilding of the premises. [MAULE, J. In case of bankruptcy of the tenant, his assignees would be entitled to the insurance money. The covenant to insure, therefore, does not evidently do any good to the lessor; nor does the breach of it evidently do him any harm. In order to ascertain the actual damage resulting from a breach, we must look at the surrounding circumstances.] Precisely so. The mesne landlord has *614] no power to prevent a breach by his sub-lessee *of the covenant to repair. To what extent of compensation is he entitled if a breach is committed?

Crompton, (with whom was *Aspland*.) *contra*. The forfeiture in respect of which the plaintiff seeks to recover in this action, was incurred, by reason of his own default. This is an attempt to put the defendants into the position of parties who have indemnified their lessor against the consequences of their breaches of covenant. The forfeiture might have happened although the defendants had performed their covenants to the very letter. [MAULE, J. Though the sub-lessees might perform their covenant without performing the covenant of their lessor, they could not break their covenant without also causing a breach of his covenant.] That would be so as to the covenant to insure, (a) but not as to the covenant to repair: and it does not appear for the breach of which of these covenants the ejectment was brought. (b) In *Neale v. Wyllie*, 3 B. & C. 533, 5 D. & R. 442, where the tenant, under a lease containing a covenant to repair, underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered,—it was held that the damages *and costs* recovered in that action, and also the costs of defending it, might be recovered, as special damages, in an action against the undertenant for the breach of his covenant to repair. But that case was doubted in *Penley v. Watts*, 7 M. & W. 601, and expressly overruled in the subsequent case of *Walker v. Hatton*, 10 M. & W. 249. In *Penley v. *615] Watts*, A. leased premises *to B. from the 25th of March, 1828, for sixteen years, wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased

(a) If the sub-lessees omitted to insure, their covenant would be broken; but there would be no breach of covenant on the part of Logan, their lessor, unless he and his co-lessees omitted to insure.

(b) *Quære*, whether a party who enters after the accrual of two rights of re-entry, is not necessarily to be considered as in, in respect of both.

the premises to C. from the 24th of June, 1884, for four years and three quarters, wanting eleven days, and C. covenanted with B. to keep the premises in repair, (the covenants so far being in the same terms as in the original lease,) and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry, the damages were assessed at 64l. 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previously to the commencement of the action. B. afterwards sued C. for the amount of, the dilapidations and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57l. 10s.: and it was held that B. was not entitled to recover also the amount of the costs in the former action. *Parke, B.*, in the course of the argument there, says: "The lessee and his *assignee* are liable to precisely the same extent,(a) and the assignee is a surety for the lessee; but that is not the case in a sub-lease: the only contract of the sub-lessee, is, to perform the covenant in his sub-lease: and the only question here is, whether these costs were the necessary consequence of the breach of *such* covenant. There is clearly *no contract of indemnity." And, in his judgment, the same learned judge says: "This is not an action on a contract of indemnity; if it were, the defendants would be responsible, unless they had put themselves into the same condition as the plaintiffs, and saved them from all harm, and, amongst other things, from the costs of the action brought against them: and, if the plaintiffs had desired to be so secured, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease; and then they might have recovered these costs: *Duffield v. Scott*, 3 T. R. 864,(b) is an authority for that. But this is not a contract of indemnity, but only a covenant to keep the premises in a certain state of repair, and a covenant materially differing in its terms from that of the plaintiffs." And, after stating the terms of the respective covenants, his lordship proceeded—"These two covenants are not *ad idem*, either in substance or in terms; the dates are different; and, under the defendant's contract, the amount of damages is, the damage necessarily sustained by the breach of their own covenant, viz. the amount necessary to put the premises in the same state of repair in which the defendants ought to have kept them." The sub-lessee may satisfy his covenant by doing that which would not be a performance of the covenant of his lessor, even though the two covenants were identical

(a) The lessee is liable for breaches of covenant incurred during the term, by whomsoever committed: the assignee is liable for breaches of covenant incurred after the assignment to himself and before any assignment over. But, with regard to the *quality* of the acts done by them, and in respect of which they are liable to the lessor, the position of the lessee appears to be identical with that of the assignee, provided the covenant broken be either one which runs with the land *ex provisione legis*, or one which may run with the land, and which actually does so, by force of an express stipulation.

(b) And see *Jones v. Williams*, 7 M. & W. 493.

in their terms. In *Walker v. Hatton*, a messuage and premises were demised to the plaintiff by a lease bearing date the 10th of May, 1828, for twenty-one years from the 25th of March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs, *617] *which, on a view of the premises by the lessor, should be found wanting, of which notice should be given. By lease of the 15th of June, 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days. This lease contained covenants, with the exception of a stipulation as to painting outside wood-work, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require repair. The plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that, as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered 68*l.* damages, and 58*l.* 12*s.* for costs, and he (the plaintiff) himself incurred costs amounting to 58*l.* 14*s.* 4*d.* It was held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair; and that, although the covenants contained in the sub-lease were (with the exception of that relating to painting) in form, the same as those in the original lease, they were, in effect, substantially different, the periods at which the leases were granted, being different. In the course of the argument, PARKER, B., said: "The *618] covenant to repair being general, in both the original *and the underlease, they would be different in effect; because the defendant, being a sub-lessee, is only bound to put the premises in the same condition as he found them at the time of the lease to him. Suppose this were a lease of a new house for one hundred years, and there were a general covenant to repair, and at the end of fifty years a person were to take an underlease, with a covenant in the same words, the latter covenant must be construed with reference to the state of the premises at the time." (a) And Lord ABINGER, in giving judgment, said: "I do that think that the covenant entered into by the defendant,

(a) See *Stanley v. Tinsgood*, 3 N. C. 4, 3 Scott, 313; *Mantz v. Goring*, 4 N. C. 451, 6 Scott, 27" (per *nom.* *Young v. Goring*;) *Gutteridge v. Musyard*, 1 M. & Rob. 334.

extended to the payment of the whole of these damages, but only of that portion of them which was necessarily incurred by the plaintiff. Now, the real damage he sustained was, the sum of 68*l.*, being the amount recovered by the plaintiff in the former action. The costs were certainly incurred by the present plaintiff in his own wrong; for, he could have put an end to the controversy between him and his lessor, by the payment of that sum in the first instance, or he might have subsequently paid it into court. If we held that any more damages were recoverable, there would be no limit. The only safe rule is, to confine the verdict to those which were the *necessary* result of the act complained of, viz. the want of repair: and I cannot see how it can be contended that the costs of both the plaintiff and the defendant in the former action, were the natural or necessary consequence of that act. I think the case of *Neale v. Wyllie* is not law, and that it was decided on a mistaken principle; and I think it better that I should at once express that opinion, than attempt to make a distinction between that case and the present; since making distinctions *which have no solid foundation, only tends to keep up litigation. I concur in the decision of the [619 court in *Penley v. Watts*, which governs the present case." And PARKE, B., adds: "This case is on all-fours with that of *Penley v. Watts*, which certainly makes it extremely difficult to support the judgment in *Neale v. Wyllie*. Although the covenants contained in the sub-lease are, with the exception of that relating to painting, the same in language with those contained in the original lease, yet they are different in substance; the periods at which the leases were granted being different. It is now perfectly well settled, that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate; and, as the one lease was granted in 1828, and the other in 1880, allowing an interval of two years, it is clear that the covenants would not have the same effect, but would vary substantially in their operation. With this explanation, there is no distinction between this case and *Penley v. Watts*." If that decision be correct, it disposes of this case. It is no answer, to say that the plaintiff could not enter on the premises for the purpose of doing the repairs himself. He might have reserved to himself such a power. In *Clow v. Brogden*, 2 M. & G. 39, 2 Scott, N. R. 303, in covenant, the declaration stated that the plaintiffs and A. B., since deceased, being possessed of a certain house for the residue of a certain term of ninety-four years wanting twenty days, demised the same to the defendants for twenty-one years, at a certain rent, by an indenture containing a covenant to repair, and alleged a breach of that covenant; by means whereof all the estate and interest of the plaintiffs and A. B. in the house became and was forfeited, and the same reverted to C. D., who thereupon availed himself of the *forfeiture, (a) and brought an ejectment, (b) [620

(a) Vide supra, 600, n.

(b) Vide supra, 601, n.

in which he recovered judgment, and obtained possession of the house; by means of which premises the plaintiffs, since the death of A. B., had lost the rents covenanted to be paid by the defendants, &c. The plea traversed the alleged breach of the covenant to repair; on which, issue was joined. At the trial, the plaintiffs claimed damages for the loss of their term, and for the amount of dilapidations in the house demised to the defendants. It appeared by the particulars delivered in the ejectment brought by C. D., that such ejectment was founded upon the breach of certain covenants contained in a superior lease granted by C. D., for ninety-nine years, and that the breaches of covenant relied on were, the non-repair of various houses, including the house in question, (which was shown to be out of repair,) and for the breach of a covenant which was not contained in the lease to the defendants. It was held, that, inasmuch as it did not appear that C. D. might not have recovered possession of the property for a breach of the covenant not contained in the lease to the defendants, the plaintiffs were not entitled to recover the value of their term from the defendants. TINDAL, C. J., in the course of the argument, observed: (a) "The objection arises on the *per quod*; it is not a part on which a traverse can be taken; the question is whether it may not be rejected." And, subsequently, he said: (b) "There is this difficulty in the way of the plaintiffs. In the particulars delivered in the ejectment brought by Lord Somers, it appears that the action was brought for a forfeiture caused by a breach of covenant which is not contained in the lease to the defendants. How are we to know that Lord Somers did not recover in respect of that breach alone?" So, here, it is *impossible for the court to say that the superior

*621] landlord entered for *our* non-repair or non-insurance. The covenants in the two leases, though corresponding, are not identical. The terms being different, it is impossible to refer the re-entry to the defendants' neglect to repair. And, with regard to the covenant for insurance, if the defendants had performed *their* covenant in this respect, still the original lessor might have entered, as that would not have satisfied the *plaintiff's* covenant.

The plaintiff was bound to show that he was *solely* possessed of the term. Upon the evidence, it appeared that the title was in Kinnear, the plaintiff, and Campbell. [CRESSWELL, J. Kinnear and Campbell may have been dead.] Then that fact ought to have been proved. [MAULE, J. Logan takes upon himself to deal solely with the property. You have taken an underlease from him, with notice of the lease under which he held; and you have paid rent to him. (c) Is not that evidence enough that he had the whole interest he affected to deal with?] It is submitted that no such presumption arises. The inducement was not traversable.

(a) 2 M. & G. 51.

(b) 2 M. & G. 52.

(c) The defendants having accepted an underlease, *by indenture*, from Logan alone, were, during the continuance of the term, even estopped from saying that he had not an estate entitling him to demise *solely*. Vide 4 N. & M. 296.

Peacock, in reply. [The court directed him to confine himself to the main question.] It is quite clear that the plaintiff would not be entitled to recover the rent reserved: the defendant, if sued for rent, might plead eviction by title paramount. [MAULE, J. Might not the plaintiff reply, that the eviction was caused by the default of the defendant?] That, it is submitted, would not be a good replication; rent being only incident to a holding. The plaintiff may be entitled to recover damages, but not the 365*l.* claimed, which the plaintiff *claims, though he is not liable to pay that sum to the superior landlord. [*622 The defendant says that his covenants are not the same as those contained in the original lease from Middleton. He contends, that, if Hall insures, he may get the money, and run away; whereas the landlord has stipulated for an insurance by his immediate lessees. The question is, whether the damages here claimed, viz. the value of the term, are the necessary and immediate consequences of the defendant's default. It appears that the premises are situate within the city of London, and therefore subject to the provisions of the building act, 14 G. 3, c. 78, s. 88, which was in force at the time these breaches were committed. A covenant to insure, within that act, is a covenant running with the land: *Vernon v. Smith*, 5 B. & Ald. 1.(a) Where fraud is suspected, the insurance office may reinstate the premises, instead of paying the amount of the loss; and, where no such suspicion attaches, they may do it, on the application of that party. The substance of the defendants' covenant to insure, is, that an insurance shall be kept on foot which will be available to the extent of 2500*l.*, to be laid out in reinstating the premises, in case of damage by fire. Suppose an insurance to be effected in the name of a trustee, that would be a sufficient insurance within the act. A forfeiture for not insuring is one that equity will not in general relieve against: but it clearly would relieve in a case of this sort, where the covenant is substantially, though not literally, performed. [MAULE, J. Suppose the premises insured, and burnt down under circumstances that would give the insurance office a defence as against the sub-lessees;—if the insurance were effected by the plaintiff, the office would be liable; otherwise, if effected by the defendants. The performance of the defendants' covenants would, under such circumstances, *afford no indemnity to the plaintiff. The effect of the [*623 statute is, to make the party insuring a trustee for the landlord. Suppose an under-lessee to insure, and afterwards to set the house on fire, the landlord could derive no benefit from the insurance. The meaning of the covenant is, that the covenantor shall insure *for himself*, either in his own name or in the name of a trustee.] The plaintiff has done by another what he had engaged to do. [MAULE, J. He has not done by another that which he was bound to do, but something different. The landlord would have no means of preventing the lessee from assigning the

(a) And see *Shepp. Touchst.* 176.

policy.] The defendant covenants not merely to insure, but also to produce the receipts, &c. The defendants are liable for the natural consequences of their own acts, without any express indemnity. If an attorney undertakes to enter an appearance, the court will enforce a compliance with the undertaking. [COLTMAN, J. There, the attorney undertakes to do that which his client should have done.] With respect to the covenant to repair, it is said that the covenant relates to distinct periods. Each party is bound to keep the premises in repair, regard being had to their condition at the time of entering into the respective covenants. If the defendants have incurred a forfeiture, it is no answer for them to say that there were other non-repairs for which they were not liable. The amount of damage was for the jury, regard being had to all the circumstances of the case. [COLTMAN, J. If the plaintiff is not entitled to recover the value of the whole of the reversionary interest, he is not entitled to recover any thing.] If the lessor enters partly for the act or omission of his tenant, and partly for the act or omission of his sub-lessee, the sub-lessee is liable to his immediate lessor. [MAULE, J. What would be the value of the plaintiff's reversion, if the covenant to insure had alone been broken? He would have *624] become a mere tenant at will.(a) If he was an honest man, he would describe himself in an abstract of title as a tenant at will.]

COLTMAN, J.(b) It appears to me that this is an attempt on the part of the plaintiff to turn this into what it is not, viz. a covenant of indemnity. It seems that the plaintiff had entered into covenants with the superior landlord, to repair and keep the premises in repair, and to insure; and that a forfeiture has been incurred by his breach of those covenants. He now seeks to recover from the defendants, damages which are the result of his own breaches of covenant. It appears to me, upon the authority of *Penley v. Watts* and *Walker v. Hatton*, that he cannot do this, in the absence of a covenant of indemnity. It was once supposed,—by the Court of King's Bench, in *Neale v. Wyllie*, 3 B. & C. 533, 5 D. & R. 442,—that, the first lessee not having a right to enter for the purpose of repairing, the sub-lessee was liable for all the damages resulting from the breach of the first lessee's covenant to repair. But that was overruled by the cases above referred to; and, I think, with reason, because it was competent to the first lessee to stipulate for a right to enter, or to exact a covenant of indemnity. And it is much less inconvenient that it should be so; for, then, the party knows the effect

(a) Substantially he would have been so, although, strictly speaking, the whole term would have remained in him, subject to being defeated by his lessor at any time before any act had been done by the latter to waive the right of re-entry resulting from the breach of covenant, and affirm the continuance of the lease.

In one respect, a tenant so circumstanced, would be in a worse condition than a tenant at will, inasmuch as he would not be entitled to emblements.

(b) Wilde, C. J., having been engaged as counsel in the cause, took no part in the argument.

of the covenant, and the full extent of the *liability he incurs. It is true that the sub-lessees here, had notice of the covenants contained in the original lease. But the only presumption that arises from that fact, is, that they took care to exclude all but the limited liability imposed upon them by the ordinary covenants. It seems to me that the plaintiff ought not to be allowed to cast upon the defendants all the damage resulting from his own laches. [*625]

MAULE, J. I am of the same opinion. The sub-lessees have simply covenanted to repair and to insure; they have not covenanted to pay to the plaintiff any damages that may result from the breach of the covenants he has entered into with the superior landlord. The result is, that the defendants are liable only for such damages as naturally and necessarily result from their own breaches of contract. The covenants in the two leases are different. But, assuming them to be identical, I think the loss of the term here, was not the result of the defendants' breaches of covenant, but of the breach, by the plaintiff himself, of the covenants entered into by him with his lessor.

CRESSWELL, J. I am entirely of the same opinion. The loss of the term was the consequence of the plaintiff's own breach of covenant; and the defendants have not covenanted to indemnify him. The argument that the covenants to repair in the two leases are identical, is contrary to the cases in the Exchequer.

Judgment for the defendants.(a)

(a) And see *Blyth v. Smith*, 5 M. & G. 405.

*In the Matter of SOPHIA, the Wife of W. C. CRAWFORD. [*626
June 7.

In the case of an acknowledgment taken abroad, the court will not dispense with an affidavit of verification sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule.

CHANNELL, Serjt., in the last term, moved that the certificate of the taking of this acknowledgment might be received and filed by the proper officer, notwithstanding that the affidavit verifying the same was not sworn before the proper officer. The application was founded upon the affidavit (sworn before the British consul at Frankfort-on-the-Maine) of one of the commissioners, a gentleman residing at Wiesbaden, in the grand-duchy of Nassau, who deposed "that he applied to Dr. Anton Lambinet, one of the justices of the peace in Mentz, in the grand-duchy of Hesse-Darmstadt, authorized to administer oaths in proceedings of the peace in Mentz, there to be sworn to an affidavit of the due acknowledgment of Sophia, the wife of William Cooper Crawford, now residing in Mentz, mentioned and set forth in the said certificate; that he also

applied to Dr. Frantz Klein, a notary public residing in Mentz, to be present at the time of swearing such affidavit, for the purpose of obtaining a certificate from him that he was present when such affidavit was made, and that the party administering such oath was legally authorized for that purpose; and that both the said justice of the peace and the said notary public informed the deponent, that, according to the laws of that country, neither the said justice of the peace, nor any other person, was authorized to sign documents and administer oaths written in any other than the German language; that there is no British consul resident at Mentz; and that the consul residing at Frankfort-on-the-Maine is the nearest resident British consul to Mentz."

*627] *The court requiring an affidavit explaining why the affidavit of verification was sworn before a British consul, instead of before the proper local functionary, the papers were again sent out, and returned with letters from the commissioner (verified by affidavit) stating that, by the law of the country, the subject-matter being of greater value than 150 florins,^(a) no affidavit could be sworn without the whole history of the transaction being translated into the German language, and embodied in a suit or "an act of court." Upon these materials,

Channell, Serjt., now renewed the application. He submitted, that, although the difficulty of the affidavit being required to be sworn in the German language, might be got over by annexing a translation thereto, — *In re Birch & Bell*, 4 N. C. 394, 6 Scott, 185; *In re Eady*, 6 Dowl. P. C. 615, — yet that it was impossible to comply with the other requisite of the German law, viz. that the transaction must form the subject of an act or suit in the local courts.

WILDE, C. J. In the case of commissions directed to persons resident in foreign parts, the court requires the affidavit verifying the taking of the acknowledgment, to be sworn before an officer duly authorized, by the laws of the place, to administer oaths. It appears, that, by the laws which prevail at Mentz, all affidavits are required to be administered in the German language, and with the formality of what is called an act of court. We are now called upon to dispense with an affidavit sworn and authenticated in the manner required by the foreign court, without a suggestion that that course will be attended with such a degree of inconvenience as to justify us in so doing. If it had been shown that great

*628] *delay or expense would result from the proceeding in the foreign court, this court would have considered that as equivalent to a case of total absence of any accessible local authority to administer an oath. I think enough is not shown here to justify a departure from the ordinary rule.

The rest of the court concurring,

Channell took nothing.

(a) 13l. 2s. 6d., at the ordinary exchange of 21d. to the florin (guilder.)

WHITE v. CHAPPLE and Another. June 3.

The sheriff having seized goods under process out of this court, an officer of the palace court, during the temporary absence of the sheriff's officer, (whose son remained on the premises with the warrant,) took the goods under process of that court. This court refused to interfere, either by granting an attachment against the officer of the palace court, or by ordering him to refund a sum paid to him in order to obtain the release of the goods.

On the 23d of April last, the sheriff of Middlesex seized certain effects belonging to the defendants, by virtue of a writ of *fi. fa.*, directing him to levy 155*l.* 10*s.* for debt and costs in this action. An officer was left in possession, the premises on which the effects were seized consisting of skeletons of houses, in an unfinished state, and the effects seized being contained in two workshops and a yard belonging thereto. On the 11th of May, the officer so left in possession absented himself from the premises for a few minutes, for the purpose, as he alleged, of procuring necessary food and refreshment, the warrant in the meantime being entrusted to his son, who remained on the premises therewith. On his return, he found one Herrick, an officer of the palace court, in possession, under a warrant, upon a judgment of that court for 27*l.* 10*s.* 2*d.*, who refused to withdraw, notwithstanding the first warrant was shown to him, and who afterwards removed the goods. The goods so carried away were worth about 100*l.* [*629]

The amount of the palace court judgment, and costs, having been paid, in order to release the goods,

Wordsworth, on behalf of the sheriff, moved for an attachment against Herrick, or that he might be ordered to refund the money paid to him. He submitted that this improper interference with an officer of the court in the execution of his duty, was a contempt of its process; and that, at all events, the court would afford the sheriff protection. [WILDE, C. J. The sheriff's officer not being actually on the premises at the time the second seizure was made, how can we say there has been an intentional contempt of the process of the court? It resolves itself into a mere case of disputed possession. COLTMAN, J. It appears that the sheriff cannot return a rescous of goods taken under a *fi. fa.*; (a) for, he may raise the *posse comitatus*. (b) MAULE, J. If there has been no rescue, there can be no contempt.] No doubt, the application is of the first impression. The only question is, whether the officer is not entitled to some protection. [WILDE, C. J. The only case that occurs to me as at all analogous, is, that of a contempt of the great seal, in seizing goods in the possession of the messenger of the court of bankruptcy. In those cases I know Lord ELDON was always very shy of granting attachments.] The sheriff is, at all events, entitled to have the money refunded.

(a) *Conn. Dig. tit. Rescous*, (D. 4), (D. 7), citing 1 Show. 180, 2 Roll. Abr. 459, l. 30, (19 Vin. Abr. 182, pl. 2.) 2 Saund. 244, Litt. Rep. 296.

(b) *Id.* citing *Barnes*, 430.

WILDE, C. J. The court certainly never will be disposed to surrender any part of its jurisdiction, and will always be prepared to support its officers in the *proper exercise of their duty. This, however, is not a case in which any actual force has been used, or any language importing any thing like contempt of this court or its process. It is simply the case of an officer of an inferior court, without undue violence asserting a legal right to execute process, and performing what he supposes to be his duty. There could be no contempt until the palace-court officer had removed the goods. I do not see why we should interfere to prevent him from trying the right to do so. Finding the sheriff's officer out of possession, he peaceably enters and executes the warrant intrusted to him. What other course was open to him? The sheriff does not make any application to the court in the first instance, but pays the demand, in order to release the goods: and now he wishes to try the right, by asking us for an attachment against the officer of the inferior court, or for a rule directing him to refund the money so paid. If any precedent could have been found for it, the court would have looked narrowly at the circumstances, to see whether or not they furnished ground for its interposition. None, however, has been cited; nor is the court aware of any case that is strictly analogous. It is admitted that this is a matter of the first impression. The case is, therefore, to be decided upon principle; and it seems to me, that, as there is no ground for charging the officer of the palace-court with any intentional contempt of this court, or with any violent resistance to its process, there is no foundation for the present application. The court, fully preserving its authority to protect its officers, ought not, I think, to grant a rule.

The rest of the court concurring,

Rule refused.

*631]

*In Re MARY DIXON. June 3.

The court refused to allow a certificate of acknowledgment by a feme covert, under the 3 & 4 W. 4, c. 74, to be filed, where it appeared from her answers to the inquiry of the commissioner as to whether she intended to give up her interest in the estate, without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will,—although it was shown, by another affidavit, that she perfectly understood that to be no provision, inasmuch as the will was revocable.

By the 79th section of the 3 & 4 W. 4, c. 74, it is enacted “that every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced, and acknowledged by her as her act and deed, before a judge of one of the superior courts at Westminster, or a master in Chan-

cery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided." And the 80th section enacts, "that such judge, master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed; and, unless she *freely and voluntarily consents to such deed*, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void."

By the rules of Hilary term, 4 W. 4, made for the purpose of carrying that statute into effect, it is ordered, that, before the commissioners shall receive such acknowledgment, they, or one of them, "do inquire of every married woman, separately and apart from her *hus- [*632 band, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up such interest; and, where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but, if it shall appear to them, &c., that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made *by some deed or writing produced to them*, or, if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof."

The certificate of the taking the acknowledgment in this case was in the form provided by the 84th section of the statute, stating that Mrs. Dixon was examined by the certifying commissioners, apart from her husband, touching her knowledge of the contents of the deed, and that "she freely and voluntarily consented to the same." In the affidavit verifying the certificate, however, the deponent (one of the commissioners) stated that he inquired of Mrs. Dixon whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up her interest in such estate; that in answer to such inquiry, she declared [*633 *that a provision was to be made; and that such provision was

made by a writing purporting to be the last will of her husband John Dixon.

The registrar having declined to receive the acknowledgment, on the ground that this was not such a provision as was contemplated by the rule,—a provision by a revocable instrument being in fact no provision at all,

T. Jones now moved that the registrar might be directed to receive and file it. He produced an affidavit,—sworn by one of the commissioners taking the acknowledgment,—stating that he had explained to the lady “that the will was no provision, being revocable, and that the provision intended by law was a provision by some *deed* in writing; but that she said, in answer, that she was quite aware of the nature of the provision, but that she had such confidence in her husband, that, if he made a will, she would accept the provision thereby made, although revocable; for, that her husband was of a procrastinating disposition, and might put off his intentions till too late, and that she therefore insisted on the will being made, with a provision for her.” It was submitted, that, inasmuch as there was no necessity for any provision being made, as a condition to the taking of the acknowledgment, the circumstance of the provision, in this case in reality amounting to no provision at all, afforded no substantial reason for refusing to receive the acknowledgment.

WILDE, C. J. It does not appear to me that the affidavit in this case is, by any means, sufficient. The statute (s. 85) requires the certificate, together with the affidavit verifying the same, to be filed of record, in *634] order that purchasers may see that the wife has *properly parted with her interest in the estate. The certificate states that Mrs. Dixon was examined by the commissioners, touching her knowledge of the contents of the deed, and that she freely and voluntarily consented to the same. And the affidavit states, that, when asked whether she intended to give up her interest without having any provision made for her in lieu thereof, she answered that she parted with it upon the terms of a provision being made for her; thus leaving her interest in the estate, charged with an equitable right to a provision in lieu thereof. The deponent then goes on to state that such provision was made by a writing purporting to be the last will of her husband. This inconsistency is sought to be helped by another affidavit, *to be filed in a different office*,^(a) as part of the evidence of title, showing that the lady was made clearly to understand that a provision by will was not the sort of provision contemplated by law, inasmuch as a will is revocable. The statement, therefore, of the provision in the affidavit, in truth, amounts to no provision at all.

The rest of the court concurring,

Rule refused.

(a) The affidavit used for this purpose would be filed in the Masters' office.

ALDER v. BOYLE. June 7.

[*635]

Upon a negotiation between A. and B. for an exchange of advowsons, A. agrees to pay to the agent, C., 100*l.*, "one-third down, the remaining two-thirds when the *abstract of conveyance* is drawn out." The one-third is paid. A. delivers an abstract of *his* title, but no abstract is delivered on the part of B.; and the negotiation drops.—C. cannot maintain an action against A. for the remaining two-thirds of his commission,—the event, on the happening of which his right to it was to arise, not having occurred.

ASSUMPSIT, for work and labour and commission. Plea, non assumpsit.

The cause was tried before V. WILLIAMS, J., at the second sitting in Middlesex, in the present term. It appeared that the plaintiff, who was a clerical agent, had negotiated a proposed exchange between the defendant, the rector, and owner of the advowson of the rectory, of Freshford, near Bath, and the Rev. W. Brown, the rector, and owner of the advowson, of the rectory of Little Kimble, in Buckinghamshire, of their respective rectories; and that, on the 10th of December, 1846, the following agreement was signed by the defendant:—

"The undersigned agrees to sell to the Rev. W. Brown, the advowson of the rectory of Freshford, for the sum of 4600*l.*, and to purchase of him the advowson of the rectory of Little Kimble, in Buckinghamshire, for 1000*l.* The undersigned also agrees to pay to Mr. G. Alder, the agent in the transaction, the sum of 100*l.*,—one-third down, the remaining two-thirds *when the abstract of conveyance is drawn out.*"

On the 24th of November, the defendant paid the plaintiff 33*l.* 6*s.* 8*d.* On the 1st of December, he delivered an abstract of his title to the advowson of Freshford, and no objection was made to it. No abstract was ever delivered on the part of the Rev. W. Brown; nor was any thing further done; the negotiation ultimately proving abortive.

On the part of the defendant, it was insisted that the words "abstract of conveyance," in the memorandum of the 10th of November, meant "draft deed of conveyance;" or, if they meant "abstract of title," the *action was equally premature, no abstract of the Rev. W. Brown's title having been delivered. It was also contended that the construction of the agreement was for the judge, and not for the jury. [*636]

The learned judge was of opinion that the period had not arrived at which the plaintiff was entitled to the residue of the commission: but he put it to the jury; and they, agreeing in the view taken by his lordship, returned a verdict for the defendant.

Byles, Serjt., pursuant to leave reserved to him, now moved for a rule nisi to enter a verdict for the plaintiff for 66*l.* 13*s.* 4*d.* Undoubtedly "abstract of conveyance" is not the correct phrase. But it is quite evident that it did not mean "deed of conveyance." If ambiguous, the language of the agreement being that of the defendant, it comes within the maxim, "*Verba accipiuntur fortius contra proferentem.*"

WILDE, C. J. I think there ought to be no rule in this case. It ap

pears to me to be perfectly plain, that the money was to be paid only upon the happening of an event that has not occurred. Whether the particular expression used in this agreement meant "abstract of title," or,—an abstract of title having been delivered, and the title approved of,—it points to a "draft conveyance," showing some beneficial result of the plaintiff's agency, may be open to argument. No doubt, it meant the one or the other. It is quite immaterial which: for neither event has happened.^(a) It does not appear that the parties had the means of carrying the agreement into effect. No abstract had been delivered on the part of the Rev. W. Brown; nor did the defendant's title appear to *637] have been finally approved. However *uncertain the agreement may be in one respect, there is no uncertainty in the conclusion that the period has not arrived at which the plaintiff was entitled to claim the stipulated commission.

The rest of the court concurring,

Rule refused.

(a) *Quære*, whether as between plaintiff and defendant, the agreement was not void for uncertainty.

FRANKLYN v. LAMOND and Others. June 7.

A. bought at auction three lots of one hundred railway shares each, one of the conditions of sale being "the balance of the purchase-money shall be paid at the office of the auctioneers on the day following the sale, except in cases where any special transfers are required, and to such, the utmost expedition will be given." After the sale, A. received the three hundred shares, together with a bill of parcels describing the transaction as a sale of "three hundred shares," and paid the price. The name of the owner of the shares was not disclosed at the time of the sale; but, upon A. applying for a transfer,—the constitution of the company requiring a transfer by deed,—the auctioneers informed him that they were only agents in the transaction, and referred him to B., as their principal, and as the party who, alone, could procure the transfer to be executed.

In an action against the auctioneers for not transferring:—*Held*, first, that inasmuch as they had not disclosed their principal at the time of the sale, they were personally liable,—secondly, that the bill of parcels was evidence of an entire contract for the sale of three hundred shares,—thirdly, that, by referring A. to B., the defendants discharged A. from tendering a transfer to them.

ASSUMPSIT, for not transferring and delivering, pursuant to conditions of sale, certain railway shares sold by the defendants, as auctioneers.

The first count of the declaration stated, that the defendants, on the 12th of May, 1846, put up and exposed to sale by auction, amongst other shares, divers, to wit, three hundred shares in a certain company or partnership undertaking, called Pilbrow's Atmospheric-Railway and Canal-Propulsion Company, under and subject to the following conditions, that is to say [The conditions of sale were set out; and, amongst *638] them, the *following]:—"The highest bidder to be the purchaser, &c. Purchasers to give in their names, and to pay a deposit, if required. The balance of the purchase-money, in every case, to be paid at the office of the auctioneers, at the Hall of Commerce, be

tween the hours of ten and four, on the day following the sale; except in cases where any special transfers are required; and to such, the utmost expedition will be given." Averment, that, on such exposure to sale, to wit, on, &c., the plaintiff was declared to be, and was, the purchaser of the said three hundred shares of and in the said company or undertaking; and the defendants then bargained with, and agreed to transfer and deliver to the plaintiff the said shares, at and for a certain sum of money, to wit, 15*l*. then bid by the plaintiff for the same; and the plaintiff did thereupon then give in to the defendants his name, and did then pay to the defendants, who then accepted and received of him, the amount of the said purchase-money, and exonerated and discharged him from any further payment on account thereof; that, in consideration of the premises, and that the plaintiff, at the request of the defendants, then promised the defendants to perform the said conditions of sale in all things on his part to be performed, the defendants then promised the plaintiff to perform the said conditions in all things on their part to be performed, and (a) to transfer and deliver to the plaintiff the said three hundred shares: Breach, that, although the plaintiff had always from the time of the said promise, been ready and willing to accept and receive from the defendants a transfer and delivery of the said shares; and although the plaintiff had always, from the time of making his said promise, well and truly performed the said conditions of sale in all things to be performed on his part, as the buyer of the said shares; and although a *reasonable time for the defendants to transfer and deliver to him the said shares, had elapsed before the commencement of the suit,—of which premises the defendants, during all the time aforesaid, had notice; and although the defendants, during the time aforesaid, and before a reasonable time had elapsed for the plaintiff's preparing the same, to wit, &c., had exonerated and discharged the plaintiff from preparing, or tendering to the defendants, any instrument, deed, or document for the transfer to him of the said shares; and although the plaintiff, afterwards, and after the lapse of a reasonable time for the defendants to transfer and deliver to the plaintiff the said shares, and before the commencement of the suit, to wit, on the 1st of January, 1847, requested the defendants to transfer and deliver to him the said shares; yet the defendants did not, nor would, when so requested as aforesaid, or within the said reasonable time for that purpose, or at any other time, transfer and deliver to the plaintiff the said shares, or any of them, but had wholly neglected and refused so to do; and that by means of the premises the plaintiff had lost and been deprived of divers great gains and profits, which otherwise would and might have accrued to him from the shares, had the defendants transferred and delivered the same to him, and performed their promise in respect thereof. [*639

(a) Vide *Elderton v. Eumens*, ante, p. 479.

There were also counts for money had and received, and for money found due upon an account stated.

The defendants pleaded—first, as to 15*l.* parcel, &c., non assumpserunt,—secondly, to the first count, that they did not expose to sale the said shares, &c.—thirdly, to the first count, that the plaintiff did not become the purchaser of the shares—fourthly, to the first count, that the defendants did not agree to transfer the shares—fifthly, to the first count, that the defendants did not exonerate, absolve, or discharge *640] the *plaintiff from preparing, and tendering to them, the defendants, any instrument, deed, or document for the transfer to him of the shares—sixthly, as to 15*l.*, payment of that sum into court, and no damages *ultra*.

The plaintiff joined issue on the first five pleas, and took the 15*l.* out of court, in satisfaction of the damages *pro tanto*, replying damages *ultra*.

The cause was tried before V. WILLIAMS, J., at the second sitting at Westminster, in the present term, when the following facts appeared in evidence:—The defendants are auctioneers. On the 12th of May, 1846, they put up for sale by public auction, at the Hall of Commerce, in the city of London, certain railway shares, subject to certain printed conditions,—amongst others, those mentioned in the declaration. At this sale the plaintiff was the highest bidder for, and was declared the purchaser of, three lots, numbered respectively 233, 234, and 235, in the printed catalogue, of one hundred shares each in a joint-stock company called Pilbrow's Atmospheric Railway and Canal Propulsion Company. On the day after the sale, the plaintiff called at the defendants' office, and paid 15*l.* on account of these three hundred shares, and received the certificates for the same, together with an invoice or bill of parcels, of which the following is a copy:—

“Hall of Commerce, London, May 12th, 1846.

“E. Franklyn, Esq., Dr.

To Lamond, Smale, & Lamond,

For shares at public sale.

“ 20 Midland Eastern Counties, 12*s.* 12 0 0

“ 300 Pilbrow's Atmospheric and Canal Propulsion Company, 1*s.* 15 0 0

£27 0 0”

*641] *The names of the proprietors of the several lots did not appear in the catalogues circulated by the defendants: but the lots did, in fact, belong to different individuals, for whom the defendants were agents. A few days after the sale, the plaintiff went to the defendants' office, and demanded a transfer of the shares in question. He was then informed that the defendants were not in a situation to make a transfer; and they referred him to one Blankford, on whose

behalf they had sold the shares, and who, they said, would procure the transfer to be made.

It appeared in evidence, that, according to the regulations of the company, Pilbrow's Atmospheric Railway shares were required to be transferred by deed in writing; that one Briggs was the original allottee of the shares in question; and that, although they had many times changed hands, before Blankford became possessed of them, Briggs was still the registered owner, and he was therefore the only person who could execute a valid transfer. It further appeared that the defendants had made repeated inquiries for their principal, but were unable to find him.

After many fruitless applications had been made to the defendants for a transfer, they, in answer to a demand by the plaintiff's attorney, on the 27th of January last, wrote as follows:—

“SIR, in reply to your letter of this date, we have to inform you that we shall be perfectly ready to hand you the name of the vendor of the shares, we having simply acted as agents in the matter.”

On the part of the defendants, it was objected—first, that the plaintiffs, as auctioneers, were not personally responsible—secondly, that there was no evidence that the defendants had exonerated and discharged the plaintiff from preparing and tendering a transfer—and, thirdly, that there was a fatal variance between the *contract declared on and that proved, the declaration alleging one entire [*642 contract for the three hundred shares, and the evidence showing three separate and distinct contracts for one hundred shares each.

The learned judge proposed to obviate this last objection by amending the declaration. This, however, the plaintiff declined; and it was left to the jury to say whether there was a contract for the sale of three hundred shares. They found a verdict for the plaintiff, damages 40s., the learned judge reserving to the defendants leave to move to enter a nonsuit, or a verdict for the defendants, if the court should be of opinion that any of the grounds of objection ought to prevail.

Byles, Serjt., now moved accordingly. The defendants, as auctioneers, having disclosed the name of their principal before action brought, are not personally liable. The plaintiff at the time of the sale had notice that they were mere agents. The case of *Hanson v. Roberdeau*, Peake, N. P. C. 163,(a) seems somewhat adverse. But, though it is conceded that an auctioneer may be personally liable where the money remains in his hands, it is submitted he is not liable on the special contract.

There was no evidence that the defendants ever agreed to transfer; and therefore the issue on the fourth plea, at all events, should have been found for them.

(a) In which case Lord Kenyon ruled that, where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract.

There was no evidence whatever that the defendants had exonerated or discharged the plaintiff from his obligation to prepare, and tender them, a deed of transfer. All that appeared, was, that the plaintiff went to the office and asked for a transfer of the shares, and was informed *643] that the name of the vendor was Blankford, *and that the defendants knew nothing more about him. The defendants' letter of the 27th of January carries the matter no further. It contains no refusal to do any thing they were legally bound to do. [MAULE, J. The declaration states that the defendants sold and agreed to transfer and deliver the shares to the plaintiff, and that they exonerated and discharged him from preparing or tendering to them any instrument, deed, or document for the transfer to him of the said shares. One of the conditions of sale implies that the purchaser shall get a transfer of the shares by going to the office for it. It is clearly no answer to a demand of a transfer, that you are ready to furnish the name of the vendor, a man who is not to be found. If it is impossible for the auctioneers to get a transfer executed, what is the position of the purchaser?]

There was a clear and fatal variance between the declaration and the proof. The plaintiff declares upon an entire contract for the sale of three hundred shares. The proof was, that the shares were knocked down to the plaintiff in three separate lots of one hundred each. The point arose, upon the stamp act, (a) in the case of *Emmerson v. Heelis*, 2 Taunt. 38, (b) where it was held, that, if, on a sale by auction, the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and, although all the lots together amount to a greater value than 20*l.*, no stamp is required; if the lots were separately of less value than 20*l.* [WILDE, C. J. Has not the contrary been determined since? (c) COLTMAN, J. The question has also arisen upon the statute of frauds, 29 Car. 2, c. 3, s. 17. CRESSWELL, J. In *Baldey v. Parker*, 2 B. & C. 37, 3 D. & R. 220, A. went to the shop of *644] B. & Co., linendrapers, and contracted for the purchase *of

various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some A., marked with a pencil; others were measured in his presence; and others he assisted to cut from larger bulks. He then desired that an account of the whole should be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them. It was held that this was all one contract, and therefore within the 29 Car. 2, c. 3, s. 17. (d) *James v. Chapman*, 1 Stark. N. P. C. 427, is precisely in point. It was there held, that, were different lots are sold at an auction for different sums, the contracts are separate, both in law and fact: and, in a special action

(a) And also upon the statute of frauds.

(b) *S. P. Roots v. Lord Dormer*, 4 B. & Ad. 77, 1 N. & M. 667.

(c) *Quare*.

(d) And see *Grimby v. Atkroyd*, in re, 17 Law Journ. N. S., Exch. 157.

for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. Here, the declaration states a sale *by auction*. If the bill of parcels constituted a new and entire contract, it was not a sale *by auction*. [MAULE, J. Your bill of parcels is surely evidence that there was one entire contract for the sale of the three hundred shares.](a)

WILDE, C. J. The first objection urged in this case, is, that the mere fact of the defendants' being announced in the catalogue as "auctioneers" was such an indication of agency as to absolve them from personal responsibility, though their character of agents was no otherwise intimated to the purchaser. I apprehend it to be very old law, that an auctioneer who sells, without at the time of sale disclosing the name of his principal, contracts personally. This is the simple case of parties who have sold as principals, turning round afterwards and saying that they were merely agents in the transaction. That objection, therefore, fails.

*With regard to the second point,—whether or not there was evidence of a dispensation with a tender of a transfer,—a re-
[*645
mark has been made as to the absence of a tender of a transfer to Briggs, the original allottee of the shares. That, however, is not the issue. The declaration alleges a sale and an agreement by the defendants to transfer and deliver the shares to the plaintiff, and that they exonerated and discharged him from preparing or tendering to them any deed or instrument of transfer: and the fifth plea is, that the defendants did not exonerate, absolve, or discharge the plaintiff from preparing and tendering to them any instrument or deed for the transfer to him of the said shares. What is the evidence? It all tends to show that the defendants did dispense with a tender to them of a transfer: for, when applied to, the only answer they give, is, that they are merely agents; and they refer the purchaser to Blankford, as the seller of the shares. Is not that in effect saying—"We are not the persons to make the transfer; and therefore it is useless to tender a transfer to us for execution?" Unless it amounts to a dispensation, it is mere idle talk. It seems to me that the verdict was quite correct on that issue also.

The third objection is, that the declaration alleges as a fact, that the defendants and the plaintiff purchased three hundred shares in Pilbrow's Atmospheric Railway and Canal Propulsion Company; and the evidence showed that the shares were purchased at three distinct biddings. The question is, whether there is any difference in this respect between a purchase in this way at a public auction, (b) and going into a shop and

(a) Vide infra, 647 (a).

(b) When articles under 10l. are knocked down, the sale of each is complete upon the verbal assent of the auctioneer acting as agent for the bidder: where the price of each exceeds 10l. there is no sale until a contract is signed, when one entire sale of all the articles to which the signature applies is effected.

buying three distinct articles, which are put down together in a bill of
 *646] parcels. I am of opinion that the note delivered *to the plain-
 tiff after the sale was cogent evidence of an entire contract for
 the sale of three hundred shares. It was left to the jury, whether the
 parties had agreed that the contract should be considered as a contract
 for the sale of three hundred shares for 15*l*. The note was in the hand-
 writing of one of the defendants. I think there was abundant evidence
 to warrant the jury in finding that question affirmatively. Upon the
 whole, therefore, I am of opinion that there ought to be no rule.

COLTMAN, J. I am of the same opinion. Upon the first, and the
 main point, viz., whether the defendants are personally liable, I think
 the case of *Hanson v. Roberdeau* is conclusive. The question arising
 on the fourth plea, is substantially the same. The defendants underlie
 the ordinary responsibility of a seller. Not having disclosed their prin-
 cipal at the time of the sale, it must be assumed that they contracted to
 make a good title to the things sold. Secondly, it is said there was no
 proof that the defendants agreed to exonerate and discharge the plain-
 tiff from tendering a transfer. When applied to, they refer the plain-
 tiff to Blankford, disclaiming all power to make the transfer themselves.
 That clearly amounts to a dispensation. As to the third point, I agree
 that there was evidence for the jury of a contract for the sale of three
 hundred shares.

MAULE, J. I also think there ought to be no rule in this case. This
 is an action upon a contract of sale by auction. The first question is,
 what was the contract? That is evidenced by the conditions of sale,
 and by what passed at the time of the sale; and, upon that evidence,
 the proper result is, that the defendant agreed to sell to the plaintiff three
 hundred railway shares for 15*l*. That arises in this way. As each lot was
 knocked down to the plaintiff, there was a distinct contract for the sale
 *647] of one hundred shares, which would be satisfied *by the deli-
 very of any shares in that company to that amount. But the
 subsequent delivery and receipt of the three hundred shares, with the
 bill of parcels produced, and the payment of the 15*l*., showed that the
 parties treated the transaction as one entire sale of three hundred
 shares. (a) If the three contracts remained severable, I am of opinion
 that this declaration would have been satisfied by proof of one of them. (b)
 This, then, being a contract for the sale of three hundred shares, the
 question is, upon what terms were they sold, and who were the sellers?
 The defendants call themselves auctioneers. The purchaser's name was
 known to them; but the name of the owner of the shares was not com-

(a) *Quere*, whether the contract, as evidenced by the bill of parcels, was not different from
 that declared on, as it embraced twenty other shares.

(b) In that view of the case, the plaintiff would appear not to be entitled to retain a ver-
 dict for damages which were assessed in respect of the non-delivery of three hundred shares,
 and to be entitled to bring one action or two actions in respect of the remaining two hun-
 dred shares.

municated to him.(a) One of the conditions of sale was, that purchasers were to give in their names, and to pay a deposit, if required; another, "that the balance of the purchase-money shall, in every case, be paid at the office of the auctioneers, at The Hall of Commerce, between the hours of ten and four on the day following the sale, except in cases where any special transfers are required; and to such, the utmost expedition will be given." The obvious meaning of that is, that, if the shares sold do not require any special transfer, the defendants are to do at their office all that remains to be done to put the plaintiff into possession of the full benefit of his position as purchaser. That is only modified to this extent, in cases requiring special transfers,—that the same persons who were to make the ordinary transfer, will make the special transfer as soon as they conveniently can. Such being the state *of the liabilities between the parties, it is quite clear that the defendants did [*648 agree to make the transfer of these shares. To enable them to enter into such a contract, it was not essential that they should be the registered proprietors. It was perfectly practicable for them to procure a transfer to be made, although they themselves might not be the actual owners of the shares. I also think the issue on the dispensation with a tender of a special instrument of transfer, was properly found for the plaintiff. By handing him over to Blankford, the principal, the defendants, in effect, say—"Blankford is the only person who is bound to make the transfer: it is useless to come to us with it." Their conduct amounted to a clear dispensation.

CRESSWELL, J., concurred.

Rule refused.

(a) And see *Morgan v. Corder*, Paley, Princ. & Agent, 250.

JOHN ROBERT HARGRAVE, an Infant, by MARY HARGRAVE, Widow, his Mother and next Friend, v. WILLIAM JOSCELINE HARGRAVE. June 7.

A commission having been granted by the Court of Chancery, for the examination upon interrogatories, of a witness for the defendants in an issue,—this court refused to vary the terms of that commission, by empowering the plaintiff to cross-examine the witness under it, *vivâ voce*, or to issue another commission for that purpose.

THIS was an issue directed by Lord LANGDALE, M. R., to try whether the plaintiff was the child of one John Hargrave.

F. Pulling, on behalf of the plaintiff, moved for a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to cross-examine *vivâ voce*, on oath, before the commissioners, on the commission directed to be issued by an order of the Master of the Rolls made on the 1st of December, *1846, Betsy Head Tune, a [*649 witness on the part of the defendant, residing at Boulogne; such cross-examination to take place at the same time and place with the

examination under the said commission; and why the cross-examination and answers should not be reduced into writing, and returned with the commission; or, why a commission should not issue out of this court, for the cross-examination of the said Betsy Head Tune, such cross-examination to take place at the time and place of executing the said commission out of Chancery; and why the defendant's attorney should not, within four days previous to the execution of the commission, furnish the plaintiff's attorney with a copy of the interrogatories to be administered to the said Betsy Head Tune on the part of the defendant.

The motion was founded upon an affidavit, which stated that, by a decree made by the Master of the Rolls, on the 22d of July, 1844, in a suit wherein the above-named John Robert Hargrave, an infant, by his mother and next friend, is plaintiff, and William Josceline Hargrave and others are defendants, his lordship ordered that the parties should proceed to a trial at law in this court, in Middlesex, after the then next Michaelmas term, before a special jury, upon the following issue, viz., whether the plaintiff is the child of John Hargrave in the pleadings of the said suit in Chancery, named; that, in Michaelmas term, 1845, the defendant obtained a rule for a commission to issue out of this court, for the examination *de bene esse, vivâ voce*, of Betsy Head Tune and Francois Daudenthum, witnesses on the behalf of the defendant William Josceline Hargrave, and any other witnesses on the part of the said defendant who might be resident either at Calais or Boulogne, in the kingdom of France, with liberty for the plaintiff to cross-examine the said witnesses respectively, (a) that *a commission issued, pursuant to such rule, out of this court, and the said Francois Daudenthum and Claudine his wife were examined on the part of the defendant, and cross-examined on the part of the plaintiff, but the said Betsy Head Tune (who is an Englishwoman) was present at the Hôtel des Bains, at Boulogne aforesaid, where the said commission was executed, but declined or refused to be examined; that the said issue was tried before TINDAL, C. J., and a special jury, at the sittings after Hilary term, 1846, and a verdict found for the plaintiff; that, by an order of the Master of the Rolls, dated the 1st of December last, upon the application of the defendant, it was ordered that the parties should proceed to a new trial of the said issue, at the sittings after this present Trinity term, and that the defendant William Josceline Hargrave should be at liberty to sue out a commission for the examination of Betsy Head Tune, now residing at Boulogne aforesaid,—the depositions of the said witness, and also the depositions of Francois Daudenthum and Claudine Daudenthum, taken under the said commission issued by the Court of Common Pleas, and read on the former trial of the said issue, to be read as evidence on behalf of the defendant William Josceline Hargrave, on the new trial of the said issue; that an application on behalf of the

(a) This rule was made by consent.

plaintiff had since been made to the Master of the Rolls, for liberty to the plaintiff to cross-examine, *vivâ voce*, the said Betsy Head Tune, under the said commission; that his lordship expressed a wish to grant the application, but stated that he could not do so without speaking to the Lord Chancellor on the subject, the rules of the Court of Chancery not extending to *vivâ voce* examinations, but only to examinations on written interrogatories; that his lordship, upon refusing the application, stated that he had had an interview with the Lord Chancellor on the subject, and that his lordship *regretted, with him, that he could not make the order asked for, in a particular case; that a summons [*651 was taken out before V. WILLIAMS, J., on the 2d instant, to show cause, why the plaintiff should not be at liberty to cross-examine *vivâ voce*, on oath, before the commissioner or commissioners to be named in the commission directed to be issued by an order of the Master of the Rolls, dated, &c., Betsy Head Tune, a witness on the part of the defendant, residing at Boulogne, out of the jurisdiction of this court,—such cross-examination to take place at the same time and place with the examination under the said commission; and why the cross-examination should not be reduced into writing, and returned with the commission; that, upon the hearing of this summons on the 4th instant, V. WILLIAMS, J., refused to make any order at chambers, but considered it a fit application for the court; that the deponent had heard, and believed, that the said Betsy Head Tune, during the lifetime of John Hargrave, the father of the plaintiff, lived with him at Boulogne, as his wife, and had children by him, and, it was surmised, would be examined on the part of the defendant to endeavour to prove non access between the said John Hargrave and his wife, the plaintiff's mother, within the time during which, according to the law of nature, the said plaintiff must have been begotten; and that therefore the deponent was advised, and believed,—considering the evidence likely to be given by the witness,—that her cross-examination, *vivâ voce*, was most important to the plaintiff's case, and that it was impracticable to prepare such written interrogatories for her cross-examination, as would be at all satisfactory, or lead to a full and fair investigation of the case. [WILDE, C. J.—All motions relative to the course of proceeding in the issue, should be made in the court by which the issue is directed. This application should *have been made to the Master of the Rolls.(a) It would be very inconvenient to take examinations under a commission which the court has no authority to issue. The power given to the courts by the 4th section of the 1 W. 4, c. 22,(b) is expressly limited to the issuing of commissions in

(a) Vide supra, 650, 651

(b) It enacts, "that it shall be lawful to and for each of the said courts at Westminster (i. e. any of his majesty's courts of law at Westminster,) and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, (post, 654, n.,) upon the application of any of the parties to such suit, to order the examination on oath, upon inter-

actions depending in such courts.] The case of *Bourdeaux v. Rowe*, 1 N. C. 721,^(a) shows that the application is properly made to this court. The Court of Chancery and this court have a concurrent jurisdiction in the matter.^(b) [WILDE, C. J.—There is an insuperable difficulty in our interfering with a commission out of Chancery.] That difficulty, at all events, does not apply to the latter branch of the proposed rule, which prays for the issuing of a separate commission. [MAULE, J.—A commission to cross-examine witnesses is somewhat new.] Although the usual course is, to order the examination upon written interrogatories, a power is frequently added, to enable the opposite party to cross-examine the witnesses *vidé voce*: **Duckett v. Williams*, 1 Tyrwh. 502, *653] 1 C. & J. 510, 1 Dowl. P. C. 291; *Pole v. Rogers*, 3 N. C. 780, 4 Scott, 479. [WILDE, C. J.—That is for the regulation of a proceeding emanating from this court. But did you ever know an instance of a commission issued out of one court to cross-examine witnesses who are examined under a commission granted by another court.] There is nothing inequitable in such a course.

WILDE, C. J. I am of opinion that we have no authority to grant that which is asked for. This is an issue out of Chancery, for the purpose of obtaining the opinion of a jury as to the legitimacy of the plaintiff. If any circumstances should arise to render a revision of their verdict necessary, it is to the Court of Chancery alone that the application must be made. This court acts altogether in aid of the court of equity, in the matter. The case of *Bourdeaux v. Rowe* is no authority for this motion. The Court of Chancery possesses more than the ordinary means of exercising a discretion on the subject. It appears, that on the former occasion, a commission issued out of this court for the examination of this particular witness, amongst others; and that one of the terms of that commission was, that the cross-examination should be *vidé voce*. The witness at that time declined to be examined. A verdict having been found for the plaintiff, the Master of the Rolls, not deeming it satisfactory, directed a new trial. If he had thought it more expedient that a commission should be issued by this court, as before, it is but reasonable to suppose that he would have directed an application to be made here. Instead, however, of doing that, he himself grants a commission for the examination of this identical witness. The court of equity having thus *exercised its discretion, we are called upon *654] to alter or control the terms of the commission so issued. It

rogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise; and, by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

(a) S. C., by its true name of *Bourdeux v. Rowe*, 1 Scott, 608, 1 Hodges, 93.

(b) Vide post, 654 (a).

seems to me, that, that court having in the very case,—and its authority to do so is not denied,—issued a commission for the examination of the very witness, and having expressly refused to compel the defendants to consent to the introduction of the special terms now suggested, but having thought fit to grant the commission with the ordinary powers only, it would be an incorrect and unwarrantable proceeding on the part of this court, either to vary the terms of the commission so issued, or to grant another. And it appears also that it would be utterly useless; the party having already refused to be examined at all. It is enough, however, to say, that, if we acceded to this application, we should be most improperly interfering with a proceeding of another court.

COLTMAN, J. I also think, that, the court of equity having already granted a commission for the examination of the particular witness, we have no authority to interfere with it by granting a second commission for the same purpose.

The rest of the court concurring,

Rule refused.(a)

(a) Upon an issue joined in Chancery, upon pleadings in the petty-bag office, and sent into the Court of Common Pleas, by writ of *mittimus*, for trial, a commission to examine witnesses, issuing from this court, would be within the terms of the statute, as the cause would, upon the return of the *mittimus*, be depending here. So, in B. R., where the issue joined in the petty-bag office, is delivered by the Chancellor, *propiis manibus*, to the justices of B. R. for trial. And see Bro. Abr. tit. *Jurisdiction*, pl. 41; Ib. tit. *Process*, pl. 154; Ib. tit. *Venire facias*, pl. 29; *Rez v. Lord Yarborough*, 2 Bligh, N. S. 147, S. C. 1 Dow & Clarke, 178, 6 M. & G. 258, n.

*RICHARD TUCKEY, Executor of JOHN TUCKEY, de- [*655
ceased, v. HAWKINS. June 8.

In an action by an executor upon a bond given to his testator, a demurrer to a replication traversing a payment alleged in the plea to have been made to a party stated to have been a co-executor with the plaintiff, but not shown to be alive,—on the ground that the plaintiff has omitted to describe himself as *surviving* executor,—is a frivolous demurrer.

To debt on a bond bearing date on a day more than twenty years before the commencement of the action, the defendant pleaded that the debt and cause of action in the declaration mentioned, did not accrue at any time within twenty years next before the commencement of the suit. Replication, that the debt and cause of action *did* so accrue. At the trial, the bond was produced, and appeared to be a *post obit* bond; and it was proved that the party upon whose death the sum secured was made payable, died within twenty years.—*Held*, that the plaintiff was entitled to the verdict.

Semble, that the replication would have been bad on special demurrer.

DEBT on bond, by the plaintiff as executor of the last will and testament of John Tuckey deceased.

The declaration stated, that, in the lifetime of John Tuckey, to wit, on the 16th of September, 1814, the defendant, by his certain writing obligatory, sealed with his seal,—profert,—became held and firmly bound to the said John Tuckey in the sum of 6000*l.*, to be paid to the said John Tuckey, his certain attorney, &c.: yet that the defendant, although often requested so to do, had not paid the said sum of 6000*l.*, or any

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part thereof, and the same remained wholly due and unpaid,—to the damage of the plaintiff, as executor as aforesaid, of 100*l.* &c.

The defendant pleaded—first, *non est factum*.

Secondly, that the said John Tuckey, deceased, in and by his last will and testament, named and appointed one Anthony Guy, one Richard Tuckey, the younger, and the plaintiff, executors thereof, and that, after the death of the said John Tuckey, deceased, and before the commencement of this suit, to wit, on the 1st of March, 1844, the said A. Guy, R. Tuckey the younger, and the plaintiff, duly proved the said last will and testament, and took upon themselves the burden of the execution

*656] thereof; that, afterwards, and before the commencement of this suit, to wit, on the 20th of May, 1845, the said A. Guy and the said R. Tuckey the younger died, leaving the plaintiff them surviving; and that the plaintiff then became and was, and from thenceforth had been, and still was, *surviving executor* of the last will and testament of the said John Tuckey, deceased; without this, that the plaintiff had been or was *executor* of the said last will and testament of the said John Tuckey, deceased, in manner and form as the plaintiff had above, in his said declaration alleged—concluding to the country.

Thirdly, that the said John Tuckey deceased, in and by his said last will and testament, named and appointed one A. Guy, one R. Tuckey the younger, and the plaintiff, executors thereof,—which said A. Guy, R. Tuckey the younger, and the plaintiff, duly proved the said last will and testament, and took upon themselves the burden of the execution thereof; that, after the death of the said John Tuckey, deceased, and before the commencement of this suit, to wit, on the 5th of April, 1844, the defendant paid to the said A. Guy, and the said A. Guy then accepted and received of and from the defendant, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of 7000*l.*, in full satisfaction and discharge of the debt and cause of action in the declaration mentioned—verification.

Fourthly, that *the debt and cause of action in the declaration mentioned, did not accrue at any time within twenty years next before the commencement of this suit*; wherefore the defendant prayed judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him.

The plaintiff joined issue on the first and second pleas; and replied to the third by traversing the alleged payment to Guy, concluding to the country, and adding the similitur; and to the fourth, replied that *657] *the debt and cause of action in the declaration mentioned, did accrue within twenty years next before the commencement of this suit*, concluding to the country, and adding the similitur.

The defendant struck out the similitur to the replication to the third plea, and demurred specially thereto, assigning for causes—that the replication was dubious, uncertain, and calculated to embarrass and per-

plea, inasmuch as it did not thereby appear, nor could the defendant tell whether the plaintiff, in and by his said replication, intended to put in issue the fact of payment to Guy, being joint-executor with the said R. Tuckey the younger and the plaintiff, or whether the plaintiff, in and by his said replication, intended to put in issue the fact of payment, and also the fact of Guy being such executor as in the said third plea alleged; that the said replication was capable of several and different constructions, viz. that the defendant did not pay Guy, being joint-executor with the said R. Tuckey the younger and the plaintiff,—that the defendant did not pay Guy, being an executor of the said John Tuckey, deceased,—that neither the defendant *paid Guy as executor*, nor *was Guy executor*; that the replication indirectly and argumentatively put in issue the fact of the death of the said John Tuckey, deceased, and also the time of the death of the said John Tuckey, deceased; and that the replication was, in other respects, uncertain, informal, and insufficient.

The plaintiff's attorney thereupon took out a summons to set aside the demurrer as frivolous and irregular. At the hearing of this summons, before the lord chief baron, on the 12th of August, 1846, it was urged, on the part of the defendant, in addition to the causes of demurrer specially assigned, that it appeared on the face of the record, that the right of action in respect of the bond had vested in two other persons jointly with the plaintiff, and that the plaintiff could not *sue alone in respect thereof. The lord chief baron made an order [*658 “that the demurrer to the replication to the defendant's third plea be set aside, with costs, as frivolous and irregular, and that the issue and notice of trial delivered herein, stand; the defendant to be at liberty to apply next term to set aside the order, if necessary, but without prejudice to the plaintiff's applying for speedy execution at the trial.”

The cause was tried before CRESSWELL, J., at the last Liverpool assizes. The bond, which bore date the 16th of September, 1814, was in the ordinary form, and contained the following condition:—“The condition of this obligation is such, that, if the above-bounden G. Hawkins, his heirs, &c., shall and do well and truly pay or cause to be paid unto the above-named John Tuckey, his executors, &c. the sum of 3000*l.* of, &c., within the space of six calendar months after the death of Elizabeth Branthwayt, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue.”

Evidence was given that Mrs. Branthwayt had died within twenty years next before the commencement of the suit; and that the plaintiff was the surviving executor of John Tuckey.

On the part of the defendant, it was contended, that, the plaintiff having declared upon the bond as a single bill, he was concluded by the issue he had accepted, and could not, upon the mere production of the bond, insist, that, inasmuch as it contained a condition (not appearing upon

record) which was not broken until within twenty years of the commencement of the suit, therefore the cause of action accrued within twenty years.

The learned judge, however, was of opinion that the sum mentioned in the bond was *debitum in presenti, solvendum in futuro*; and that, the condition being shown to have been broken within twenty years, *659] the fourth *plea was disproved. And, no evidence being offered in support of the third plea, he directed the jury to find, generally, for the plaintiff. Whereupon a verdict was returned for the plaintiff, upon the three issues joined.

Murphy, Serjt., in Michaelmas term last, moved to rescind the order of the 12th of August, and also for a new trial, on the ground of misdirection. Generally speaking, no doubt, a defendant sued under circumstances like the present, by pleading *non est factum*, waives the objection that all the executors are not joined, or otherwise disposed of. The rule is thus laid down in the notes to *Cabell v. Vaughan*, 1 Wms. Saund., 6th edit. 291 k, n. (3): "In actions *by executors*, they ought all to join—Brooke's Abridgment, tit. *Executors*, pl. 88; (a) though some be within the age of seventeen years—Wentw. *Executors*, 95; *Smith v. Smith*, Yelv. 180; or have not proved the will—*Brookes v. Stroud*, 1 Salk. 3; (b) or refused before the ordinary—*Hensloe's case*, 9 Co. Rep. 37 a. But, if one only bring an action, either of debt upon bond, or assumpsit, as well as tort, it seems settled that the defendant can only take advantage of it by pleading in abatement, after oyer of the probate, *that the other executor mentioned therein, is alive, not named*. If the defendant plead the general issue, he is too late: he cannot then come at the fact of there being another executor." That rule, however, does not apply here; for, issue having been taken on that part of the third plea, which alleges payment to one of three executors, it is apparent, on the face of the record, that there are executors not joined, who, for any thing that appears, may yet be living. If the demurrer was *arguable*, it was not within the province of a judge at chambers, to set

*660] it aside as *frivolous—*Bird v. Holman*, 9 M. & W. 761, where ALDERSON, B., says: "It should be a very clear proposition indeed that is to give the court a right to take away the subject's writ of error." [WILDE, C. J. What authority is there for saying that the plaintiff *must* describe himself as *surviving executor*? MAULE, J. There is no plea in abatement. The plaintiff says he is executor; and the proof is that he is so. There is nothing in the objection.]

The learned serjeant further submitted, that, in order to avail himself of the condition, the plaintiff was bound to show it upon the record; and that "the debt and cause of action" pleaded to, was that which

(a) Citing 9 E. 3, 12, 14; but the reference should have been to T. 9 E. 4, ff. 12, 14.

(b) And see *Scott v. Brient*, 6 N. & M. 381.

appeared in the declaration. He cited *Sanders v. Coward*, 13 M. & W. 65.

A rule nisi having been granted on this point,

W. H. Watson and *Cleasby* showed cause. This being a *post obit* bond, there was no necessity to assign breaches: *Murray v. The Earl of Stair*, 2 B. & C. 82, 3 D. & R. 278. The only question upon the fourth issue is,—when did the cause of action accrue. It clearly accrued six months after the death of Mrs. Branthwayt. The declaration does not necessarily import that the instrument was a single bill at the time of the making of it: it did not become capable of being declared on as such, until the condition was broken. The plea is to be construed as alleging that the plaintiff had a cause of action upon this bond, more than twenty years before the commencement of the suit. Unless it means that, it is insensible. In *Sanders v. Coward*, a plea,—after oyer of the bond, and of the condition, which was for payment of money pursuant to a covenant in an indenture of the same date, and for performance of the covenants in that indenture,—alleging that *the cause of action in the declaration mentioned*, did not accrue within twenty years next before the *commencement of the suit, was held bad on special demurrer, [*661 on the ground that it did not appear whether the defendant was pleading to the cause of action in respect of the demand of the penalty of the bond, or to any of the causes of action arising on breaches of the condition. “The action, no doubt,” says POLLOCK, C. B., in delivering the judgment of the court, “is brought for the recovery of the penalty of the bond; and, in one sense, it may be said that the penalty is the ‘cause of action;’ that it is which the plaintiff recovers; and, having obtained a verdict on one breach, the judgment would be for the penalty, and execution would be taken out for the damages on that breach, the judgment standing as a security: but the cause of action also, in another sense, is, the breach or breaches of the condition of the bond. Now, it certainly is left doubtful what the defendant meant by saying that *the cause of action in the declaration mentioned* did not accrue at any time within twenty years next before the commencement of the suit. If the action was brought for the breach of non-payment only, that might be so; but the defendant has no right to limit the plaintiff to a single breach: the action may be brought for any number of breaches. It appears to us, therefore, that the plea ought to have shown distinctly, that the defendant’s allegation was that there had been *no* breach of the condition of the bond within twenty years next before the commencement of the suit. That not being stated distinctly, and the ambiguity being pointed out as cause of demurrer, we are of opinion that the plea cannot be sustained.” All that was there laid down, is, that the cause of action is, the breach of the condition. (a) The plea having been amended, and again demurred to, that case came

(a) But it appears to rank non-payment of the penalty with breaches of the condition.

*662] again before the *court.(a) By the amended plea, the defendant,—after setting out the bond and condition upon oyer,—pleaded, that no cause of action in respect of the said writing obligatory, by reason of any breach of the said condition, or of the covenants, &c., in the indenture contained, had occurred at any time within twenty years next before the commencement of the suit: and the court held that the plea was bad,—first, for not setting out the indenture, as it might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only, would be bad,—secondly, in not properly confessing a breach of the condition. PARKE, B., in giving the judgment of the court, suggested that the proper form would have been to set out the indenture, to aver performance of all that was performed within twenty years, and to admit the breaches beyond that time, and to those breaches to plead the statute of limitations. [MAULE, J. The plaintiff might have set out the bond and the condition, and alleged that Mrs. Branthwayt died within twenty years next before the commencement of the suit.] That would have been contrary to the common form of pleading. The defendant might have set out the condition upon oyer, and then he must, to make his plea good, have averred that Mrs. Branthwayt died more than twenty years before the commencement of the suit. [COLTMAN, J. The defendant might have demurred to the replication to the fourth plea. But, the question is, whether, having gone to the jury, he has not thrown it all open.] Whether or not the cause of action accrued within twenty years, must, at all events, be question of fact, for the jury.

Hurlstone, in support of the rule. The plaintiff should have set out the condition either in the declaration or in *the replication :
 *663] *Blewet v. Appleby*, 1 Lutw. 680. Having elected to treat the sum mentioned in the bond, as a debt and cause of action existing at the moment of the execution of the instrument, the fourth plea, alleging that the debt and cause of action in the declaration mentioned did not accrue at any time within twenty years next before the commencement of the suit, is a good *prima facie* answer to the action. The condition is no part of the contract; it is a mere defeasance. *Sanders v. Coward* shows that the penalty of the bond, and the breaches of condition, give separate causes of action; and that the plaintiff has his election to declare on either, or to assign breaches in his replication. Where a defendant seeks to avail himself of the condition, he is bound to set it out, and discharge himself of the whole obligation contained therein: *Ashbee v. Pidduck*, 1 M. & W. 564. The same rule must apply to a plaintiff. The bond and the condition are different instruments, and oyer must be demanded of each of them, to entitle the defendant to oyer of each: *Cook v. Remington*, 6 Mod. 237; 1 Wms. Saund. 9 b, n. (1), 289, n. (2); *Shepp. Touchst.* 371. [WILDE, C. J. They *may be* different instru-

(a) 15 M. & W. 48.

ments : but here the execution of the one is the execution of both.] The bond is complete without the condition. The plaintiff's cause of action is complete upon the bond alone. If the plaintiff had wished to defeat the operation of the statute of limitations, 3 & 4 W. 4, c. 42, s. 3, he should have set out the condition. One of the grounds upon which the plea was held bad in *Sanders v. Coward*, 15 M. & W. 48, was, that, inasmuch as the indenture was not set out, the court could not see that the covenants were capable of being performed. So, here, if the plaintiff had set out the condition, it might have appeared to be impossible of *performance; and then the bond would have been absolute from its execution: Shepp. Touchst. 372. It is enough for the defendant to give a *prima facie* answer to the declaration. [CRESSWELL, J. The question is, whether that *prima facie* answer is not capable of being repelled by the production of the bond.] In that case, the jury would have to try a totally collateral issue. [*664]

WILDE, C. J. This is a rule to set aside a verdict for the plaintiff, on the ground of misdirection. The plaintiff has declared upon the bond as a common money bond; to which the defendant has pleaded, that the debt and cause of action in the declaration mentioned, did not accrue within twenty years next before the commencement of the suit; and the replication takes issue upon that allegation. At the trial, the bond, upon its production, appeared to be a *post obit* bond; and it was proved that the individual upon whose death the sum secured by the bond became payable, had died within twenty years,—in other words, that the cause of action, contrary to the language of the plea, did accrue within twenty years next before the commencement of the suit. The learned judge being called upon to decide whether the evidence sustained the plea, directed the jury, that the bond produced was consistent with that declared on, and, coupled with the other evidence, disproved the plea. I am of opinion that that direction was correct, and consequently that this rule must be discharged. The statute of limitations involves various anomalies, which are nevertheless well recognised.(a) Where the statute is pleaded to an action on a bill of exchange, a subsequent acknowledgment of the debt, within six years, will negative the plea, though the bill, upon the face of it, appears to have arrived at maturity more than *six years before the commencement of the action, and therefore precisely bears out the language of the plea. That is now clearly recognised by the statute 9 G. 4, c. 14, where the promise is in writing. The statute 3 & 4 W. 4, c. 42, s. 3, provides that all actions of debt upon any bond or other specialty shall be brought within twenty years after the cause of such actions or suits. What does the legislature mean by the "cause of action?" The object of the statute of limitations was, to prevent parties from being harassed by stale de- [*665]

(a) The anomalies appear to have been engrafted on the statute by the courts, in case of plaintiffs.

mands, brought forward against them at a period when all their witnesses *might* reasonably be presumed to be dead, and when the circumstance of the plaintiffs' having lain by so long without challenging them to make payment, afforded fair ground for presuming that the debt had been paid. The legislature has thought twenty years a convenient period beyond which the obligor in a bond ought to be relieved from the necessity of preserving evidence in discharge of his liability. Bearing in mind, therefore, that the sole object of the legislature was, to discharge parties from demands that might and ought to have been enforced at an earlier period, we have plain means of ascertaining the intention with which they used the words "cause of action,"—that is, a cause of action capable of being enforced. We must read the words "debt and cause of action" in the fourth plea, in the same sense in which the statute makes such a plea a bar to the action. What, then, is the meaning of this plea? That the action might have been brought more than twenty years before it was brought. Apply that to this record, and see how it sustains the objection to the ruling. It is a well-recognised mode of declaring upon a bond that is subject to a condition, as well before as since the statute, to declare on it as if it were a single bill; and there are prescribed modes by which either party may bring forward the condition, as the interests *of either may require it to be shown. In

*666] declaring, therefore, as he has done in this case, the plaintiff is not to be understood absolutely and conclusively as declaring upon a single bill. The declaration is equally consistent with its being a bond with a condition. Assuming, however, that it is to be taken conclusively upon this declaration, to have been a single bill, any subsequent pleading showing the instrument to be otherwise than a single bill, would be a departure. The declaration charging the defendant upon a single bill, and showing upon the face of it an instrument more than twenty years old, the defendant pleads that the debt and cause of action did not accrue at any time within twenty years next before the commencement of the action. Now, inasmuch as the non-commencement of the action within twenty years is a matter which the defendant is privileged to set up as a defence, the plaintiff meets that by replying that the cause of action *did* accrue within twenty years. If the defendant's construction of the declaration be right, the replication denies a matter of law apparent on the record;(a) and the proper course for the defendant was, to demur. But, supposing the plea to mean what the statute means, viz., that the plaintiff might have sued upon the bond more than twenty years before, that would be matter of fact as well as matter of law: and the plea would be well met by the replication, the effect of which is,—the bond, though with a condition, has become single by the non-perform-

(a) The allegation in the declaration that the bond *was made* in 1816 would have been satisfied by proof that it was made in 1846. The time is first made material by the negative allegation in the plea, which allegation it would be necessary for the plaintiff to traverse,—whether the bond was single or was subject to a condition.

ance of the condition; and therefore I so declare upon it. The truth is, that the plea is framed with reference to the well-known mode of *declaring upon bonds. When the parties go down to trial, [*667 it appears that the bond, which is declared on in a form consistent with either description of instrument, is a bond with a condition; and that that condition was first broken within twenty years. It seems to me, therefore, that the plea was negatived, and that, if the argument urged on the part of the defendant was well founded, it should have led to a different course of pleading.

COLTMAN, J. I am of the same opinion. The evidence was properly received at the trial, and warranted the verdict. The intention of the statute was, that the claim should not be barred, if the plaintiff could show a cause of action accruing within twenty years next before the commencement of the suit. The cause of action must, undoubtedly, be referred to the bond. And it appeared upon the evidence that there was a cause of action accruing in respect of the bond within twenty years. This construction puts the defendant under no sort of difficulty. He might, if he had a good defence under the statute, have craved oyer of the bond and condition, and pleaded to it. He has not, however, attempted to do that. I am rather disposed to agree with Mr. *Hurlstone*, that the plaintiff might, in his replication, have set out the condition, and averred a breach of it within the twenty years. And, possibly, the replication, as it now stands, was open to a special demurrer; because it is rather to be inferred, from the frame of the declaration, that the twenty years ought to run from the date of the bond.(a) However that might be, it is quite clear that the defendant has passed by the proper time for availing himself of that, and has chosen *to put the whole before the jury. Upon the evidence, it is clear that [*668 there was a breach within twenty years.(b)

V. WILLIAMS, J. I am of the same opinion. The plaintiff went down to nisi prius to prove, and did prove, that the cause of action in respect of which he was suing, did accrue within twenty years.

CRESSWELL, J. I continue to entertain the opinion I expressed at the trial. According to Mr. *Hurlstone's* argument, the declaration is consistent with the bond being a bond with a condition; otherwise, the replication could not have been in the form suggested. Having joined issue on the replication, in its general form, the defendant has waived any objection that might have been open to him, had he taken a different course.

Rule discharged.

(a) The date, though *prima facie* evidence of the day of execution, appears to be otherwise material only for the purpose of identification. Where a bond dated in January, is executed in March, the twenty years will expire in March.

(b) From the evidence, it might also be inferred that there had been no earlier breach. Where there are breaches beyond and within the twenty years, the statute will, it is conceived, run from the day on which the first breach occurred.

F. M. YOUNG v. GROVE. *June 8.*

The testator devised all his real and personal estate to trustees, upon trust to sell, and, after payment of debts and legacies, to invest the residue of the moneys, and to stand possessed thereof in trust to pay the annual proceeds to the testator's widow for her life; and, after her death, as to one-third, to certain charitable uses:—*Held*, that, at all events the devise to the trustees was valid during the lifetime of the widow.

DEBT, for money had and received, and money found due upon an account stated. Plea, never indebted.

At the trial, before ERLE, J., at the last summer assizes for Devon, the plaintiff claimed, as brother and heir of C. M. Young, a sum of 30*l.*, the rent of lands received by the defendant, as surviving devisee in trust, and executor, under the will of C. M. Young. One *Kingdon
*669] produced a lease, by indenture, of part of the lands of C. M. Young, made to him by C. M. Young, and proved that the defendant had demanded and received the rent reserved upon that lease accruing since the death of C. M. Young. It was objected, on the part of the defendant, that it was not competent to the plaintiff to try his title to the inheritance, in an action for money had and received. It was answered, on the part of the plaintiff, that the rule of law, that the title to land cannot be tried in an action for money had and received, applies only to cases in which the law has provided a more direct remedy, and not to a case where the heir is seeking to obtain the rent of land demised by the ancestor; that the heir, having no right to the possession during the term, could enforce his claim against the defendant only by taking the course which he had adopted. The learned judge having overruled the objection, (a) the will was put in, by which C. M. Young devised and bequeathed his real and personal estate to the defendant and one Putt, their heirs, &c., upon trust to sell and convert the same into money, and, out of the moneys to arise therefrom, to pay debts and legacies therein mentioned, and to invest the residue in the public funds, or upon real security, and to stand possessed of the same upon trust to pay, out of the annual proceeds, a certain annuity to the testator's mother for life, and, subject thereto, upon trust to pay the rest, residue and remainder of such annual proceeds, to his wife for life, and, after her death, upon trust equally to divide and apportion the said funds and securities into three equal parts. After disposing of two of these third
*670] parts, for the benefit of the children of the attorney who *prepared the will, and of the surgeon who attended the testator in his last illness, (b) the testator proceeded—"and the last third part I hereby direct my trustees to pay and divide equally between The Devon and Exeter Hospital, The Deaf and Dumb Institution, and The Exeter

(a) And see *Ariss v. Skulsky*, 2 Mod. 260, 262; *Monypenny v. Bristol*, 2 Russell & Mylne, 117. See vide *Cunningham v. Laurence*, 1 Bac. Abr. tit. *Assumpsit*, (A).

(b) Vide Code Civil, No. 909.

Dispensary, to the use of the said respective institutions." (a) By a codicil the testator devised to the plaintiff the Hundred of Black Torrington, a bare franchise to which no lands or rents were attached. The widow of the testator is still living.

On behalf of the plaintiff, it was insisted, that, the devise, being, as to one third part, within the prohibition of the mortmain act, 9 G. 2, c. 36, ss. 1, 3, (b) was altogether void.

*The learned judge, however, being of opinion that the devise was valid, nonsuited the plaintiff. [*671]

Manning, Serjt., in Michaelmas term last, obtained a rule nisi for a new trial, against which

Crowder and *Montague Smith* now showed cause. The only question is, whether the devise is *entirely* void, by reason of the charitable bequests; otherwise, the heir can, at all events, take nothing until the death of the widow. The authorities upon this subject are all one way. Although the statute, in express terms, avoids limitations to charitable uses—*Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710, 1 Jarman on Devises, 200; yet it does not therefore avoid other limitations in the same

(a) These bequests had been revoked by a codicil, which the defendant, for some cause not disclosed, did not put in. The action was really brought to prevent the heir from being disinherited for the benefit of strangers, whom the testator had never seen.

(b) After reciting that "gifts or alienations of lands, tenements, or hereditaments in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, to uses called charitable uses, to take place after their death, to the disherison of their lawful heirs,"—for remedy thereof s. 1, enacts, "that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any way conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate, (other than stocks in the public funds,) be and be made by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of execution and death,) and be enrolled in his majesty's high court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death,) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

And, by sect. 3, "all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect any lands, &c., or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, &c., or of any estate or interest therein, or of any charge or encumbrance affecting or to affect the same, to, or in trust for, any charitable uses whatsoever, which shall at any time be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

deed which are not within the act—*Doe d. Thompson v. Pitcher*, 6 Taunt. 359; * *Willet v. Sandford*, 1 Ves. sen. 186. In *Doe d. Thompson v. Pitcher*, GIBBS, C. J., says: "I cannot find in this act any words which make the entire deed void. The words are, 'all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, or of any estate or interest therein, shall be absolutely and to all intents void.' I think this grant of that interest in land which by the terms of the grant is to be applied to a charitable use, is void; but I think the statute makes nothing more void, and that the deed, so far as it passes other lands, not to a charitable use, is good." In *Doe d. Toone v. Copestake*, 6 East, 828, 2 J. P. Smith, 495, a devise to trustees, of a reversion in land, (after payment of debts, &c., which were found to be paid,) to be applied by them and their successors, and the officiating ministers, for the time being, of a Methodist congregation, *as they should from time to time think fit to apply the same*, was held not to be a devise to *charitable uses*, within the statute. And Lord ELLENBOROUGH said: "The application in this case is left to the trustees still more indefinitely than it was in *Morice v. The Bishop of Durham*, 9 Ves. 399. They may build houses with it, or do what else they think fit." "But," added his lordship, addressing himself to the defendant's counsel, "what answer can be given to the other point, that the legal estate, being given to the trustees, must rest with them, and they must be entitled to recover at law upon their legal title, in whatever manner the Court of Chancery may hereafter deal with their application of it." The law is similarly laid down by the Master of the Rolls in *Hopkinson v. Ellis*, 16 Law Journ., N. S., Chanc. 59. The most recent case upon the subject is that of *Doe d. Chidgey v. Harris*, 16 M. & W. 517, 16 Law Journ., N. S., Exch. 190. There, a testator devised houses to *trustees, to sell the same, and to apply the proceeds in payment of legacies to religious and charitable societies: he also gave legacies to various persons, and made his brother residuary legatee: and it was held that the trust estate was not void under the statute. PARKE, B., says: "In the 2d vol. of Powell on Devises, 3d edit., by Jarman, pp. 20, 21, it is laid down, that, if part of a devise is charitable, and part not, but the two objects are inseparably connected, the whole is void; but, if they are unconnected, the will may be good for that part which is good, and bad for the part that is bad. That was, in effect, decided by *The Attorney-General v. Ward*, 3 Ves. 327." And ALDERSON, B., added: "This view of the case is supported by the judgment of Lord HARDWICKE, in *Arnold v. Chapman*, 1 Ves. sen. 108."

Manning, Serjt., and *Taprell*, (with whom was *Kinglake*, Serjt.,) in support of the rule. The 3d section of the act does not simply declare void the *charitable uses*, but expressly enacts that "the gifts, grants, and conveyances," &c., shall be absolutely and to all intents and pur-

poses null and void: and the reason given by BAYLEY, J., in *Doe d. Burdett v. Wrighte*, is that, "if that were not so, a party might consider himself bound in honour, though not in law, to convey the estate to the uses prohibited." This point did not arise in *Willet v. Sandford*: Lord HARDWICKE's judgment there proceeded upon a supposed analogy of the mortmain act to the popery acts, which in truth does not exist: (a) *Adams and Lambert's case*, 4 Co. Rep. 112 b, 113 a; *Whetston's case*, cited, 4 Co. Rep. 116 b; *Sir Bartholemew Read's case*, Sir F. Moore, 654. [V. WILLIAMS, J. You do not deny that the gift to the wife for life would be *good, notwithstanding the devise of the residue were void by the mortmain act?] They are two separate trusts. [*674] It is contended, however, that the devise, so far as it affects to dispose of the legal estate, is void altogether. The act is a remedial one, and to be construed liberally in favour of the heir-at-law. (b) In *Greenwood v. The Bishop of London*, 5 Taunt. 727, 1 Marsh. 292, the patron, being also rector, of B., agreed for 8750*l.* to convey to D., clerk, the advowson in fee, and immediately to resign the rectory, and present D. thereto, pay all expenses, and allow D. 60*l.* for dilapidations, and that D. should have the profits from a day then past. The ordinary refused to accept the vendor's resignation, whereupon D. agreed with the patron for the purchase of the advowson at 8000*l.*, allowing 60*l.* for dilapidations, and he was to be entitled to the profits of the rectory from the same past day: and, four days after, the vendor agreed to grant him a lease of the tithes, for the vendor's life, at a peppercorn rent. The conveyances were accordingly executed, and the money paid. Upon the death of the vendor, the king presented to that turn, for simony; and, upon the death of the king's clerk, the heir of the vendor disturbed the purchaser, insisting that the grant of the advowson was void, by reason of simony. It was contended, that the conveyance, purporting to carry the whole advowson, including the next presentation, was at all events (assuming the contract to be simoniacal) no further void than the simoniacal part of the transaction,—which could touch only the next presentation,—extended; and that so much of the conveyance as applied to the legal part,—the fee of the advowson,—was to be supported. GIBBS, C. J., in delivering the judgment of the court, said: "There can be no doubt that the conveyance even of an advowson in *fee, which in itself is legal, if it be made for the purpose of carrying a simoniacal contract into execution, is void, as to so much as goes to effect that purpose; and, if the sound part cannot be separated from the corrupt, is void altogether." The true distinction is this—where a will or a deed creates several distinct estates, the instrument is valid as to such estates as are not burdened with any illegal object; but, where one entire estate,—as the fee devised to the defendant,—is partly subjected to the carrying out of an illegal purpose, the whole of that estate is, by the

(a) And see 1 Edw. 6, c. 14.

(b) Shelford on Mortmain, 164.

express words of the statute, void. The statute will have little force if a legacy of a few shillings is to vest the legal estate in a trustee for raising 100,000*l.* for a charitable use. How far the fee which has descended to the brother, may, in equity, be chargeable with the trusts created in favour of the mother and widow, it is unnecessary to inquire.

WILDE, C. J. I am of opinion that this rule must be discharged. The question turns upon the statute 9 G. 2, c. 36, the language of which is certainly very general. We are not, however, now called upon, for the first time, to construe that statute. The construction that has been put upon it in several cases, ancient as well as modern, is, that it was intended to avoid the gift or conveyance so far as it relates to the charitable use, and no further. Let us see how the authorities stand. In *Arnold v. Chapman*,—a decision which took place in 1748,—there was a devise of an estate to Chapman, subject to a charge of 1000*l.* for a charitable purpose. In one sense, that clearly was a devise to charitable uses: but, mixed up with that devise, was a devise for the benefit of Chapman that was free from objection. It was held that the devise was good, but the charge void so far as concerned the application of the *676] money; and that Chapman took the estate, subject *to the charge of the 1000*l.* for the benefit of the heir-at-law. Then comes the case of *Willet v. Sandford*. The will is not set out further than as Lord HARDWICKE refers to it in his judgment. “By the will,” says his lordship, “the estate in the land, and the use, are devised to the three trustees and their heirs: for, a devise of land, by force of the statute enabling to devise, carries the estate in the lands, and the use too, without saying to the use of the devisee; but the trust and beneficial interest is to the charity. By the codicil, the estate in the land, and the use, are given to the same trustees and two others: the trust for the charity is exactly the same; but there is some variation of the surplus profits. It is undoubtedly a new devise of the legal estate; and therefore it was objected, that, being subsequent to the mortmain act, it is void, as well as the trust: but that was soon given up at the bar; because the variation of the trusts of the surplus profits, being good, is sufficient to support it: as it was held in all those acts which on a devise to unlawful trusts make the legal estate as well as the trust void: but, with this distinction, that, if part of the trust is good, it will support the legal estate; as, upon the popery act, if part of a trust is for a protestant as well as for papists; and then the only consideration of equity is, *how far* the trust is made void by the act.” The difference in the terms of the acts referred to, is not material to the judgment of the court there. *Willet v. Sandford*, therefore, is also a distinct and express statement of Lord HARDWICKE’s opinion, that the devise is void only to the extent of the illegality. Then we come to *Doe d. Burdett v. Wrighte*. Looking attentively at the whole of Mr. Justice BAYLEY’s judgment in that case, it will be found to be adverse to the present plaintiff. The devise

there was, "to G. Sharp, his heirs and assigns, for ever: but my wish and desire is, that the said G. Sharp do, *in his lifetime, by proper deeds, convey, &c., the said manor, &c., to some charitable uses, to take place at his decease, and not before: the particular uses to be limited I leave entirely to his discretion, having the fullest confidence, as well in his judgment of the choice of proper objects, as in his integrity in the disposal thereof according to the wish by me expressed; but it is my intent and meaning that the said G. Sharp shall enjoy the said estate to his own proper use and behoof, during his life." That was, in effect, a devise to G. Sharp for life, and for charitable uses afterwards. Nothing can be more entire than that devise: and yet the court divide it, and say, that, as the estate was given to Sharp for a legal purpose during his life, although the ultimate disposition was illegal, the devise was good as to the former, though void as to the latter part; and therefore that the heir-at-law took the estate on the death of Sharp. Some of the cases turn rather upon the question whether the uses declared were charitable uses or not. In addition to these cases, we have the recent decision of the Court of Exchequer in *Doe d. Chidgey v. Harris*, in which my brother *Manning's* argument failed to induce the court to grant a rule upon this point, although they granted it upon another. In addition to this, we have the highly respectable authority of Mr. Jarman's *Treatise on Wills*, tending the same way. Upon every principle of justice, it appears to me that full effect is given to the statute, by supporting so much of the devise as is not strictly within its prohibition. I am, therefore, of opinion that this devise is perfectly good, at all events, to an extent sufficient to support the widow's life-interest; and that is enough for the purpose of to-day.

COLTMAN, J. I am of the same opinion. I think the matter is conclusively settled by the decisions of *Lord HARDWICKE, a judge whose authority is pre-eminently entitled to weight in cases of this sort. The only case that could, for a moment, induce a doubt, is that of *Doe d. Burdett v. Wrighte*: but that, when properly understood, is in strict accordance with our present decision; which is also fortified by the recent case of *Doe d. Chidgey v. Harris*.

CRESWELL, J. I am of the same opinion. I know no point that can be considered as settled, if this is not. Rule discharged.

KEPP and Another v. WIGGETT and Others. June 10.

In an action against a surety upon a bond conditioned for the due payment to the receiver-general of all sums received by a collector of assessed-taxes, a judge at chambers has no authority to order the proceedings to be stayed as to certain items in the plaintiff's particulars of demand, upon payment of their amount into court.

DEBT, upon a bond in the penal sum of 8000*l.*, bearing date the 6th of October, 1846, given by the defendants and one James Lee, deceased,

to secure the due collection and application by Lee, of the property and income tax for a portion of the parish of St. Martin-in-the-Fields.

Before the delivery of the declaration, *viz.* on the 5th of May, 1847, the following particular of demand was delivered, pursuant to a judge's order:—

"This action is brought to recover the sum of 8000*l.*, being the amount of the penalty of a bond dated the 6th of October, 1846, given by the defendants and James Lee, deceased, to secure the due collection and application by Lee of the several duties in the said bond and condition mentioned; being the duties on profits arising from property, professions, trades, and offices, within the wards of New Street, Bedfordbury, Drury Lane, and Long Acre, in the parish of St. Martin-in-the-Fields, *679] in the division of the city and liberty of Westminster, in the county of Middlesex, for the year ending the 5th of April, 1847; the penalty of which bond, the plaintiffs contend, hath become forfeited. And the plaintiffs, without prejudice to such other breaches as they may be enabled to prove, will particularly rely on the misapplication or non-payment by the said James Lee, of the several amounts received by him in respect of such duties, of the several persons hereinafter mentioned, in or about the months of August, September, and October, 1846, that is to say,

"Messrs. Coombe & Co., Castle Street,	501	0	6
"Mr. Bickers, Long Acre,	1	6	3
"Mr. Watts, Woburn Street,	1	9	2
"Mr. Cockings, Long Acre,	5	2	11
"Mr. Blunt, Hemmings Row,	8	5	1
"Mr. Weston, Mercer Street,		6	5
"Mr. Huntley, Castle Street,		14	0
"Mr. Huggins, Bedfordbury,		14	7
	<hr/> £513 18 11"		

On the 6th of May, a declaration was delivered, not setting out the condition of the bond. On the 21st, after two summonses for time to plead, the defendants took out a summons calling upon the plaintiffs to show cause "why, upon payment to the plaintiff, or to the receiver-general of her majesty's taxes, of the last seven sums or items mentioned in the particulars of the plaintiff's demand, amounting in the aggregate to 12*l.* 18*s.* 5*d.*, with costs, to be taxed, all further proceedings should not be stayed; or why, upon payment of the said sum of 12*l.* 18*s.* 5*d.*, with 6*s.* 8*d.* for the costs of that application, the said several items should not be struck out of the particulars of the plaintiffs' demand in this action."

*680] *This summons was attended before V. WILLIAMS, J., on the 22d, when, it being alleged, on the part of the defendants, that the first sum mentioned in the particulars had been received by Lee be-

fore the execution of the bond, the learned judge inclined to make an order in one or other of the alternatives. But, doubting his power to do so, he adjourned the hearing, and, ultimately, on the 28th, he made the following order:—

“Upon hearing the attorneys or agents on both sides, I do order, that, upon payment into court of 12*l.* 18*s.* 5*d.*, the amount of the second and subsequent items in the particulars of demand, all further proceedings in this cause, as to those items be stayed,—the plaintiffs being at liberty to sign judgment as a security for any future breaches of the condition of this bond, if any; but such judgment not to be signed until after the trial of an issue or issues raised, or to be raised, upon the defendant's liability to the first item in the particulars, or until the further order of the court or a judge herein.”

Channell, Serjt., on a former day in this term, obtained a rule nisi to rescind this order. He submitted, that, this not being a bond for the payment of a specific sum, within the 4 & 5 Ann. c. 16, s. 13, and not being a case in which the party was entitled to relief under the 8 & 9 W. 3, c. 11, s. 8, the learned judge had no power to make such an order: and he referred to *Marsen v. Touchet*, 2 W. Blac. 706; *Gowlett v. Hanforth*, 2 W. Blac. 958; *Van Sandau v. —*, 1 B. & Ald. 214; *Tighe v. Crafter*, 2 Taunt. 387; and *Steel v. Bradfield*, 4 Taunt. 227.

**Byles*, Serjt., showed cause. It may be conceded, that, before the 8 & 9 W. 3, c. 11, the court, or a judge, had no power to [*681 afford the relief given by this order. But it is quite clear that the order only carries out the object of that act; and it imposes no hardship on the plaintiffs. In *Brunsdon v. Austin*, 1 Tidd's Practice, 9th edit. p. 545, where trover was brought by the assignees of a bankrupt, for a steam-engine, &c., the court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up. So, in *Earle v. Holderness*, 4 Bingh. 462, 1 M. & P. 254, in trover for a packet of letters, the defendant was allowed to stay the proceedings as to one of the letters, upon delivering it up and paying the costs. In *Fisher v. Prince*, 8 Burr. 1364, Lord MANSFIELD and WILMOT, J., concurred in the following distinction,—“that, where trover is brought for a specific chattel of an *ascertained* quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its *real and ascertained value* must be the *sole measure* of the damages, there the specific thing demanded *may be* brought into court; (and WILMOT, J., said, this was the more reasonable, as this action of trover comes in the place of the old action of detinue:) where there is

an *uncertainty* either as to the quantity or quality of the thing demanded, or that there is any tort accompanying *it that may
 *682] enhance the damages *above* the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall *not* be brought in."(a) [WILDE, C. J., referred to *Willoughby v. Swinton*, 6 East, 550.]

Channell, Serjt., in support of the rule. In *Van Sandau v. —*, one, &c., the bond was conditioned for the payment of a principal sum in the year 1820, with interest in the meantime half-yearly; and, an action having been brought for the penalty, upon a breach of the condition in non-payment of a half-year's interest on the 29th of September, 1817, the court refused to stay the proceedings before judgment, on payment of the interest due, and costs, although the non-payment of the interest was owing to a slip. And in *James v. Thomas*, 5 B. & Ad. 40, the plaintiff having brought an action to recover the whole principal and interest upon a bond with a penalty, conditioned for the payment of money at a given day, and interest in the meantime, with a stipulation, that, on any default in paying the interest, the whole sum should be demandable,—it was held that the case was not within the 8 & 9 W. 3, c. 11, s. 8, and therefore that the plaintiff was entitled, after verdict, to have judgment and execution for the whole principal sum, and not merely for the interest. That case is expressly in point, to show that the defendant was not entitled to the relief given by this order.

WILDE, C. J. I think, if we abstained from making this rule absolute, we should be assuming a power which does not properly belong to the court. The legislature,—having this particular subject under its
 *683] consideration,—in the 8th section of the 8 & 9 W. 3, c. 11, *enacts, that, "in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon the trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and, if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nilhil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or nisi prius of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sus-

(a) And see *Tucker v. Wright*, 3 Bingh. 601, 11 J. B. Moore, 500.

tained thereby; in which writ it shall be commanded to the said justice or justice of assize or nisi prius, that he or they shall make a return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and, in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or, if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their *executors or administrators, shall be fully paid or satisfied all such damages [*684 so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in each case, such judgment shall remain, continue, and be as, further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment, against the defendant or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution shall not be had or awarded upon the said judgment,—upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner aforesaid; and that, upon payment or satisfaction, in manner aforesaid, of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*; and the defendant, his body, lands, or goods shall be discharged out of execution as aforesaid.” We are now asked to supply something in which, it is said, the legislature has stopped short, and thereby to take from the plaintiff certain rights which the law has given him. I think we are not at liberty so to do. Certain exceptions have been introduced by decided cases, involving, in some instances, a departure from the language of the act, which I should *have felt great difficulty in adopting. Though I yield to these, I do not feel myself warranted in introducing a new class of cases. Although, therefore, that which is done by the order in question might have been very fit and proper to be done, if there were any authority for it, in the absence of such authority I think we have no alternative, but must set it aside.

COLTMAN, J. I am of the same opinion. The statute in question is

more than one hundred and fifty years old: and, as the inconveniences must have arisen frequently, the lapse of time, and the entire absence of authority for such a proceeding, are powerful reasons against the validity of this order.

MAULE, J. I also think the rule must be made absolute. It is admitted, indeed it could not be denied, that, before the statute of 8 & 9 W. 3, c. 11, there existed no power in the court to grant the relief afforded by this order. The court, then, having no common law power to relieve in such a case, it has no jurisdiction in a case of this sort, except such as is given by that statute. It is not pretended that the statute in express terms gives the court the power that the judge has assumed to exercise here: it is merely suggested that it is only carrying out the professed object of the act. If the legislature had intended to provide for a case like this, they would have had no difficulty in doing so. But I think we have no right to usurp their functions, which we should in effect be doing if we suffered this order to stand.

CRESSWELL, J. I also think that if we were to uphold my brother WILLIAMS'S order, we should be assuming to ourselves a power which the legislature has not thought fit to give us. Rule absolute.

*686] *RICKETTS and Another v. BENNETT and FIELD.

June 10.

One of several co-adventurers in a mine, has not, as such, any authority to pledge the credit of the general body, for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred.

ASSUMPSIT, for money lent, money paid, work and labour, commission, interest, and money due upon an account stated. Plea, non assumpsit.

The cause was tried before PLATT, B., at the last summer assizes for Cornwall. The facts were as follows:—The plaintiffs were bankers at Penzance. The defendants were two of the co-adventurers in a mine called The Wheal Providence. The mine, which, it appeared, was carried on upon the cost-book principle, was divided into one hundred and twenty-eight shares of about 15*l.* each. Ninety-nine of these shares were possessed by one Alexander Robinson, and his son, F. T. Robinson. The defendant Bennett held four shares, and Field five and a half; both of them having become interested in the concern about June, 1844. Alexander Robinson, who acted as manager of the mine, opened an account with the plaintiffs in September, 1844, in the names of "The Wheal Providence Adventurers;" the first item in which account was a sum of 280*l.*, borrowed from the plaintiffs for the purpose of paying a debt due from F. T. Robinson to the Helston bank. Alexander Robinson

continued to borrow money from the plaintiffs upon the ore-notes of the mine, paying interest for a short time at 4*l. per cent.*, and afterwards at 5*l. per cent.*, until December, 1845, when the account closed with a balance due to the bank of 3668*l.*, to recover which this action was brought. The money, except in a few instances, was drawn for by checks, signed, "For The Wheal Providence Adventurers, Alexander Robinson." The rest were signed by F. T. Robinson, who was purser of the mine.

*Alexander Robinson, who was called as a witness for the plaintiffs, admitted that he had no *express* authority to borrow [687 money on account of the mine, and that the defendants had no notice that he had done so: but he stated that nearly all the money he obtained was expended by him for the purposes of the concern. He further stated that both the defendants from time to time attended at the mine; and that the pass-book was kept at the counting-house; but that he could not say that either of the defendants had ever seen it.

Within a fortnight after the account with the plaintiffs was first opened, Alexander Robinson obtained an advance of money from the plaintiffs, for the express purpose of making a dividend. The defendants received this, and subsequently two other dividends, at the banking-house of Messrs. Glyn & Co., in London, having no knowledge that the money had been borrowed for the purpose. The first intimation they had of the fact, was, the demand made upon them for the balance of the account, in December, 1845; when they at once repudiated it.

No evidence was offered on the part of the defendants: but it was insisted that the mere relation of co-adventurer in a mine did not give authority to the manager to pledge the credit of the whole body, for money borrowed.

The learned judge told the jury, that, generally speaking, one partner in a mining concern has no authority to bind his co-adventurers for money borrowed; but that such an authority may be inferred from the surrounding circumstances: and he left it to them to say, whether, upon the facts proved, they could infer that Robinson, the manager, had borrowed the money in question, with the assent of the defendants.

The jury having returned a verdict for the defendants, **Crowder*, in Michaelmas term last, obtained a rule nisi for a new trial, [688 on the grounds of misdirection and that the verdict was against evidence. He referred to *Dickinson v. Valpy*, 10 B. & C. 128, 5 M. & R. 126; *Tredwen v. Bourne*, 6 M. & W. 461; *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 708; *Crawshay v. Maule*, 1 Swanst. 495; *Ex parte Bonbonus*, 8 Ves. 540; and *Taylor v. Fisher*, 2 Hare, 228.

Butt, *Kinglake*, Serjt., and *Merivale*, showed cause. The case was properly submitted to the jury, and the evidence fully warranted the verdict. The principle upon which the mine in question was worked, viz. the cost-book principle, which precludes one co-adventurer from

pledging the credit of the rest, is so well established, and has been found to be so conducive to the interests as well of the public as of the adventurers themselves, that the legislature has thought fit to except mines so worked from the operation of the very wholesome provisions contained in the 7 & 8 Vict. c. 110,(a) for the registration, incorporation, and regulation of joint-stock companies. In order to sustain the objection to the direction of the learned judge, the plaintiffs must contend that a mining association stands upon the same footing as an ordinary trading partnership. The distinction, however, between the two is well recognised in equity as well as at law. In an ordinary partnership, the selection of an associate rests with the parties themselves. In the case of a mine, it is otherwise: any one of the adventurers may part with

*689] his interest to *whomsoever he pleases, by a mere entry of the substituted name in the cost-book. In Collyer on Partnership, (1st edit. 658, 2d edit. 785,) it is said: "Material distinctions exist between mining and other partnerships, both as regards the power of each adventurer to assign his share, and also the effect of the bankruptcy or death of any adventurer. The first of these distinctions is referred to by Lord ELDON, in *Jefferys v. Smith*, 1 Jac. & Walk. 301; but both of them are expressly mentioned by Sir JOHN LEACH, in the late case of *Fereday v. Wightwick*, M. T. 1829." (b) In that the Vice Chancellor says:—"Mining concerns are, to some purposes, trading concerns, but they are not so as to all: they are not so in this particular,—namely, that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the other partners. In these particular instances, they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have." In *Dickinson v. Valpy*, it was distinctly held that the directors of a mining association cannot bind the members by accepting a bill of exchange, unless they are authorized so to do by the deed or instrument of co-partnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or by the express assent of the party sought to be charged. Observing on this case, and *Ducarry v. Gill*, M. & M. 450, 4 C. & P. 121, Mr. Collyer says, (1st edit. 664, 2d edit. 791:) "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills; because the drawing and accepting of bills is necessary

*690] *for the purpose of carrying on a trading partnership. But, as this power is not generally necessary for the purposes of carrying on the business of a mining company, the law will imply no authority in the directors of a company, to bind the shareholders by

(a) The 63d section of which enacts, "that nothing in this act contained shall extend, or be construed to extend, to any partnership formed for the working of mines, minerals, and quarries, of what nature soever, on the principle commonly called the cost-book principle."

(b) S. C. 1 Russ. & Mylne, 45, Tam. 250. And see 1 Russ. & Mylne, 50.

bills of exchange. And, *a fortiori*, the agent of a mining company has no implied authority to bind the shareholders, by bills drawn or accepted by him in the name of the company." *Tredwen v. Bourne* was the case of a scrip-mine. The prospectus showed the principle upon which the concern was to be conducted. All that was decided there, was, that there was no evidence to go to the jury, that the defendant gave authority to the directors to pledge his credit to the plaintiff. PARKE, B., there says: "If the case had stood merely on the fact of the defendant's being a shareholder, I should have thought it was not sufficient." In *Hawtayne v. Bourne*, it was held that the resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears; nor in any other case of necessity, however pressing. That is a remarkably strong case: unless the wages were paid, the interests of the adventurers would have been most materially prejudiced. PARKE, B., there says: "It appears that the learned judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law, to support this proposition. No such power exists, except in cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer. The latter derives its existence from the law of merchants; and, in the former case, the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself, if necessary. If that case be analogous to this, it follows that the agent had power, not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of a master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent." Here, there was no necessity for borrowing money for the purpose of carrying on the mine. *Hawken v. Bourne*, like *Tredwen v. Bourne*, proceeded upon the ground of the defendant having, by his conduct, recognised the practice of purchasing goods upon credit. *Steigenberger v. Carr*, 3 M. & G. 191, 3 Scott, N. R. 466, is an authority to the same effect. Even in the case of an ordinary trading partnership, if money be lent to one partner, who professes to borrow it for the purposes of the firm, and he misapplies it, and there

be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner: *Lloyd v. Freshfield*, 2 C. & P. 325. The circumstance of Alexander Robinson being manager of the mine, as well as a co-adventurer with the defendants, did not give him any greater authority to pledge their credit for loans of money. Robinson's own evidence *692] negatived his having *express* authority to *borrow money for the use of the mine; and none of the other evidence in the cause in the least degree warranted the jury in finding any *implied* authority for that purpose.

Crowder, Channell, Serjt., and *Smirke*, in support of the rule. It may at once be conceded that partnerships in mines are not, in many respects, like ordinary trading partnerships. For instance, the members cannot bind each other by negotiable instruments. That was decided in *Dickinson v. Valpy*, 10 B. & C. 128, 5 M. & R. 126, and *Hawken v. Bourne*, 8 M. & W. 703; and to that those cases are limited. It has been expressly determined, since the decision in *Dickinson v. Valpy*, that an association for the working of mines is a trading co-partnership, and subject to most of the incidents belonging to such a partnership. *Crawshaw v. Maule* is a distinct authority for that. [MAULE, J. The ground of the decision in that case, fails here. Lord ELDON thought that to be a partnership into which a stranger could not be obtruded against the wish of the general body. Here, however, there is no such restriction; any one of the co-adventurers might, at any time, dispose of his shares in the concern without consulting the rest. WILDE, C. J. The real question is, whether it is or is not *usual* and *necessary* that the manager of a mine worked upon the cost-book principle, should have authority to bind his co-adventurers, for money borrowed for the purposes of the mine.] The circumstance of the mine's being worked upon the cost-book principle, in no degree affects the question. The case of *Tredwen v. Bourne* shows that much of what is said by BAYLEY, J., in *Dickinson v. Valpy*, cannot now be supported. The observations made by PARKE, B., in the course of the argument, are extremely important. *693] "The directors," he says, "have authority to do all *that it is usual to do in the management of mining companies." And, again, addressing himself to the defendant's counsel, he says: "You do not prove any engagement whereby it was stipulated that the directors should have only the limited authority you contend for: and the question is, whether there was not evidence to go to the jury, that the defendant gave them a more extended authority, viz. to do all that directors of a mining company usually do for carrying on the concern. In *Fleming v. Hector*, 2 M. & W. 172, the rules of the club were proved, which showed that the authority of the directors was expressly limited." *Hawken v. Bourne* shows, that, if one partner is allowed to manage the mine on account of the general body, he has an implied authority to

obtain on credit goods necessary to the efficient working of the mine. [MAULE, J., referred to *Whitehead v. Tuckett*, 15 East, 400. There, the plaintiffs, brokers, were in the habit of buying and paying for, and of selling and receiving the value for, sugars, on speculation, in their own names, and upon their own judgment, for their principal; sometimes, when the market was low, under an unlimited authority as to quantity and price; at other times, under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; and keeping only a general account with the principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and re-sold. It was held that they might bind their principal by a re-sale of a particular parcel of sugars before purchased and paid for in their own names, and lodged in their own warehouse, though sold under the price directed by him,—the general authority *of brokers to sell so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Tredwen v. Bourne* distinctly determines that the members of a mining company have authority by law (in the absence of any proof of a more limited authority) to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines. [MAULE, J. The defendant there, knowing that the concern was being carried on by the directors upon credit, and not interfering, it was held that there was evidence for the jury that he had impliedly authorized them to pledge his credit. Assuming that the managing owners of a mine have authority to get goods on credit for the purpose of the mine, does it follow that they may borrow money?] What difference is there, in principle, between an implied authority to order goods and to pay for them, and an implied authority to borrow money for the purpose of buying goods? [WILDE, C. J. Suppose the master of a ship purchases supplies on credit, would the owner be liable for money borrowed on bottomry for the purpose of paying for them? I apprehend not. The master has a general authority to borrow on bottomry for the purchase of necessary supplies, but not to pay debts.] If that be so, it is not matter of general principle. In *Lloyd v. Freshfield*, the transaction was out of the ordinary course of business, and the bankers were guilty of negligence. Speaking of the liability of co-owners of a ship for repairs, Lord ELDON, in *Ex parte Bland*, 2 Rose, B. C. 92, says: "Where the repairs are ordered by the master, he, in the first place, incurs a personal liability; and, considering him in general as the servant or agent of the owners, in the *employment and management of the ship, they also become responsible for his orders, unless they are expressly excluded by the terms of

the contract. The same observation applies to the case where a part-owner gives the order; the liability attaches against them all, unless it be expressly provided against." In all cases where parties are connected together in the ownership of a mine, it is for the general benefit that the authority now contended for should exist. In *Thicknesse v. Bromilaw*, 2 C. & J. 425, where one of two partners in a slate and stone quarry, having authority to bind the other by drawing or endorsing bills of exchange, raised money by bills in fictitious names, endorsed by him in the partnership firm, and the money was afterwards applied to the partnership purposes,—it was held that the other partner was liable to the persons from whom the money was so obtained. It was assumed there that one partner might bind the other by borrowing money. The same principle was applied in the case of insurance-brokers, in *Ex parte Bonbonus*, 8 Ves. 540, and in that of navy-agents, in *Sandilands v. Marsh*, 2 B. & Ald. 678. A mining association is, in all essential particulars, a trading partnership; and there can be no good reason why such a partnership should be excepted out of the ordinary liabilities that attach to the relation of partner. The learned judge should have told the jury, that, in the absence of evidence of a more restricted liability, the circumstances were such as to warrant them in inferring that Robinson, the manager, had authority to pledge the credit of the defendants in the manner he affected to do. There was abundant evidence to show that the defendants were aware of the banking account having been opened, *696] and that they assented to it; and, having had all the benefit, *it is but fair that they should be held responsible for the balance.

WILDE, C. J., now delivered the judgment of the court.

This was a motion for a new trial, on the grounds of misdirection, and that the verdict was against evidence. The facts were shortly these:—One Alexander Robinson, in his own name and that of his son, F. T. Robinson, purchased a mine in Cornwall, named The Wheal Providence, for a sum of 1500*l.*, calling their interest, that of holders of one hundred shares of 15*l.* each. The defendants also appeared to be owners of a small number of shares in the concern,—four or five each; but the evidence is silent as to the period at which they first became possessed of these shares. Alexander Robinson (his son acting as purser) assumed the management of the mine, and continued to manage it down to the time of the closing of the account in respect of which this action arises. In September, 1844, Alexander Robinson,—having then a private account with the bank of the plaintiffs, Messrs. Ricketts & Co., of Penzance, and also other accounts for other mines,—opened an account with them in the name of The Wheal Providence Adventurers; the first item being a sum of 280*l.* borrowed from the plaintiffs for the purpose of paying a private debt of F. T. Robinson to the Helston bank. At the time of opening this account, Alexander Robinson informed the manager of the bank that considerable accommodation would be wanted:

and it was agreed between them that the bank should discount the ore-notes of the mine at 4l. *per cent.*, which was shortly afterwards increased to 5l. *per cent.* The account went on in this way for a considerable time, Alexander Robinson drawing money by checks signed, "For The Wheal Providence Adventurers, A. Robinson." Within a *fort- [697 night after the opening of the account, Alexander Robinson (holding, together with his son, as before observed, ninety-nine or one hundred shares in the concern) applied for an advance of money for the purpose of making a dividend; which, he informs the bank, he deems expedient. He did not, however, at that time draw for the amount of his own and his son's dividends; but he did so shortly afterwards, the bank paying his drafts without distinguishing on what account the money was drawn. Having thus obtained advances from the bank,—part of which was applied to the purposes of the mine, and part to the private purposes of the Robinsons,—in the result, the account, towards the close of 1845, became overdrawn to the extent of 3668l.; and, the two defendants being found to be shareholders, this action is brought against them to recover that sum. The defendants had no notice that the dividends (three having been made in the whole) were paid out of borrowed money: nor had they any notice of the existence of the account with the plaintiffs, until the balance was demanded of them; and then they at once repudiated it.

The case on the part of the plaintiffs was not very distinctly put, either at the trial or upon the argument of this rule. It did not very clearly appear whether they insisted that the defendants were liable simply by reason of their being shareholders, or as being partners with the manager of the mine. In fact, the only difficulty in the case arises from the circumstance of our minds not having been sufficiently invited to the distinction.

The points urged on the argument, were—first, misdirection—secondly, miscarriage of the jury.

The objection taken to the ruling of my brother PLATT, was, that he told the jury that the defendants were not liable, *simpliciter*, for money borrowed by a *co-adventurer. In other words, that the mere [698 fact of the defendants' being shareholders in the mine, did not give to a co-adventurer authority to pledge the credit of the defendants for money borrowed. The learned baron, however adds, that such an authority may be implied from the surrounding circumstances: and he leaves it to the jury to say whether,—the defendants being co-adventurers with Alexander Robinson, and he being manager, and having opened the account in the name of the concern,—regard being had to all the evidence given on the part of the plaintiffs, any implication of authority necessarily arose for the borrowing of moneys essential to the well conducting of the adventure. The charge of misdirection applies itself only to the first part. What authority has been presented to the

court for holding, that one who becomes party to an adventure of this sort thereby gives authority to his co-adventurers to pledge his credit? In the case of ordinary trading partnerships, each member of the firm has equal authority with his co-partners to deal according to the usual course of business. Hence it is that there is an implied authority in each, to a very considerable extent, to bind the firm by accepting bills and borrowing money. Is that the case with reference to mines? By no means. It is well known that *all* the co-adventurers in a mine do not assume an equal degree of authority, but that the management is invariably intrusted to certain of them. If it were held, as a principle of law, that any one of the co-adventurers, independently of management, had an implied authority to pledge the credit of the whole for a loan of money, would not that be inconsistent with the known usage in such cases? Who, if that were the law, would become party to such a scheme? If there be any such implied authority in one of the co-adventurers to bind the whole, such authority must result from the fact of his having *699] the management of the concern intrusted to him, and not from the mere circumstance of his being one of the co-adventurers. Many of the remarks made in the course of the argument, as to the supposed analogy between an association of this sort and an ordinary trading partnership, were founded upon an incorrect view of the subject. Though they have many points of resemblance, there are also many in which they very materially differ. The partners in an ordinary trading concern are supposed all to be equally in the management: it is not so, however, in the case of a mining adventure. The course that many judges have thought to be the right course, was pursued here; for, the learned baron told the jury that the circumstance of their being co-adventurers in the mine, did not, of itself, authorize Robinson to borrow money upon the credit of the defendants; and he left it to them to say, whether, regard being had to the nature of the concern, and the course of dealing of the parties, Robinson had any implied authority for that purpose. Robinson's evidence distinctly negatived his having any *express* authority.

Many authorities have been referred to; but it is difficult to understand whether they were relied upon in support of the objection to the ruling, or as impeaching the propriety of the verdict.

In *Dickinson v. Valpy*, 10 B. & C. 128, 5 M. & R. 126,—a case which is deeply impressed upon my mind, from the circumstance of my having been counsel in the cause, and from its being one of the earliest cases in which I was concerned at the bar,—one of the questions was, whether a co-adventurer in a mine was bound by the acceptance of bills by the directors? How was that question dealt with by the court? Lord TENTERDEN says: "I am of opinion that the mere circumstance *700] of the defendant's having become a shareholder in a mining company, does not, in point of law, make him answerable for bills

drawn or accepted by those who took upon themselves to manage the concern. BAYLEY, J., says: "In order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills. Now, upon that point, the only question which could be submitted to the jury, was, whether companies instituted for similar purposes, had constantly been in the habit of drawing and accepting bills; or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power. There was no evidence to warrant the judge in leaving those questions to the jury. First, there was no evidence for them, that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose." And he afterwards adds: "The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members." LITTLEDALE, J., says: In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company." And the judgment of PARK, J., is much to the same effect. The result of that case is, that, in an association for the working of mines, only such authority in one of the co-adventurers to pledge the credit of the rest will be implied by law, as is usual and necessary for the working of mines; and there is nothing in that case to impeach either the ruling or the verdict upon this occasion.

*The next case is *Tredwen v. Bourne*, 6 M. & W. 461, where [*701 goods had been supplied on credit for the use of the mine, by order of the directors. The defendants there appeared to have interfered with the management of the concern, in such a manner as to show that they were cognisant of the fact of the business of the mine's being carried on upon credit; and therefore it was left to the jury, not simply whether the defendants were liable by reason of their having been co-adventurers, but also whether they knew of the concern being carried on by the directors, and those employed by them, in the manner it was,—in which case, the jury were told, the defendants were liable; and upon the jury finding this question in the affirmative, they were held to be liable. I observe that Mr. *Crowder*, in the course of the argument in that case, states something that does not appear to have been in evidence here, but which I believe to be quite correct as regards mines that are worked upon what is called the cost-book principle:—The business of a mine is carried on quite differently from that of an ordinary trading firm. Regular calls are made, as money is wanted for the purpose of the partnership, which are paid down; and the directors have only autho-

city to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders." PARKE, B., in the course of the argument says: "The directors have authority to do all that it is usual to do in the management of mining companies." There is nothing there that is inconsistent with the position—that the degree of authority is to be judged of by the nature of the concern, and the mode in which it has been carried on. In delivering his judgment, the same learned judge says: "The sole question was, whether there was evidence to go *702] to the jury, that the defendant gave *authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient." That is just what was said by my brother PLATT on this occasion. As far as that case goes, therefore, it is a distinct authority in support of the present verdict.

The next case it is important to notice, is, *Hawtayne v. Bourne*, 7 M. & W. 595. That was an action against a co-adventurer in a mine, to recover a sum of money borrowed by the agent of the mine. It is an extremely important case, as showing in what manner, and to what extent, partners in mining adventures are held liable for contracts entered into on behalf of the concern. The debt, it appeared, was *bond fide* incurred in raising money for the payment of wages to the miners. Proceedings had been taken to enforce payment, and the property of the mine had been seized, and was about to be sold. The consequences of stopping the works would have been very serious. The mine would, in all probability, have been filled with water, and much difficulty and expense would have been incurred on recommencing the working. In one sense, therefore, there clearly was an urgent necessity for paying these debts. Looking at the necessities of the moment, my brother MAULE told the jury, that, although, under ordinary circumstances, an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet, if it became necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity: and he left it to them to say whether the pressure on the concern was *703] such as to render the advance of the money a case of such *necessity. The jury found that it was. The Court of Exchequer, however, granted a new trial,—holding that this was not within the ordinary authority of an agent, and that such authority is to be measured by the ordinary necessities of the concern, and not by sudden and extraordinary occasions. There is nothing, therefore, in that case, to sanction the idea that any authority to pledge the credit of the concern in this way, is to be inferred from the mere circumstance of being a co-adventurer.

The next case is *Hawken v. Bourne*, 8 M. & W. 703. It had been thrown out by some of the judges in *Tredwen v. Bourne*, that, if there

was any express restriction or limitation of the authority of the directors to contract debts, that should have been shown; and that, apparently, gave rise to *Hawken v. Bourne*, where the existence of such a limitation of authority was proved. As soon as the attention of the judges was called to it as a point in judgment, they felt, that, if the authority to be implied from the nature of the concern, and the usual mode of conducting such adventures, is to be at all restricted by the agreement of the partners, the world, or those who deal with the concern, should have notice of such restriction. Therefore, when the prospectus limiting the authority of the directors was put in, the court said that could not affect the plaintiff's rights, because he must be assumed to have dealt with the directors upon the supposition that they were acting under the authority usual in cases of the kind. That is a distinct recognition of the principle upon which the summing up in this case proceeded.

No evidence was given here of any usage as to borrowing of money by mining adventurers; nor any evidence of necessity. But it appeared that the defendants *never in any way interfered in the management of the concern: and it was sought to charge them simply on the ground that they were co-adventurers with the Robinsons. No question went to the jury as to whether the plaintiffs had notice of Robinson's misapplication of part of the money. I incline to think there was cogent evidence that the plaintiffs dealt with the Robinson's only. But that point does not now arise. I assume that the money was advanced upon the credit of the mine, and that the plaintiffs had no notice that it was applied otherwise than to the purposes of the mine. But, upon the facts reported, it appears to us that there was no evidence to warrant the jury in coming to any other conclusion than they have done. It was left to them broadly and correctly, that the defendants were not liable simply because they were co-adventurers; but that they might imply an authority in Alexander Robinson to pledge the credit of the defendants for what was necessary to the successful management of the mine, and was usual. The jury must, therefore, be taken to have found that the borrowing of money was not necessary for carrying on the business of the mine, and that it was not usual. [*704]

We are therefore of opinion that the direction of the learned baron was correct, and that the jury came to a proper conclusion upon the evidence that was before them; and, consequently, that this rule must be discharged.

Rule discharged.

***705] *FIELD v. MACKENZIE, One of the registered Public Officers of THE NEWCASTLE-UPON-TYNE JOINT-STOCK BANKING COMPANY. June 12.**

Under the 7 G. 4, c. 46, s. 13, a party moving for a *scire facias* in order to have execution against former members of a banking company, on a judgment against the registered officer, must show that he has made substantial and *bonâ fide* endeavours to obtain an available execution against the members for the time being; and the court will decide, on the motion, whether sufficient diligence has been used in the particular case.

It is not necessary that execution should first be issued against *all* the members for the time being.—Wilde, C. J., *dubitante*.

Slight evidence that the parties sought to be charged as such, were members at the time of the contract, will suffice to induce the court to grant a rule for a *scire facias* against them, in the absence of affidavits on their part negating the facts constituting their liability.

The court refused to allow the rule nisi to be drawn up for an earlier day than by the ordinary practice it would be drawn up, upon a suggestion that the period limited by the statute for proceedings against former members had nearly expired.

The court refused to set aside a rule which had been made absolute for a *scire facias* against former members of a banking co-partnership, under the 7 G. 4, c. 46, s. 13, on the ground that the party by whom the rule had been obtained had omitted to disclose the fact of his holding a collateral security upon property belonging to the bank, which, it was believed, might, by management and care, be made productive to an amount exceeding the judgment debt.

THE plaintiff having, on the 12th of April, 1847, recovered judgment against Daniel Mackenzie, one of the registered public officers for the time being of and for certain persons united in co-partnership by and under the name, style, or designation of The Newcastle-upon-Tyne Joint-stock Banking Company, for the purpose of carrying on, and carrying on, the trade or business of bankers in England, under the provisions of the statute 7 G. 4, c. 46, in an action upon a promissory note for 14,000*l.*, bearing date the 26th of February, 1845; and not having obtained satisfaction thereof, either from the public officer, or from the members of the co-partnership for the time being,—

Martin, on a former day in this term, obtained a rule to show cause why a *scire facias quare executionem non* should not issue upon the judgment, against seven persons who were respectively members of the copartnership *at the time of the making of the contract. The *706] motion was founded upon affidavits which stated—that the co-partnership in question was a co-partnership of certain persons united together for the purpose of carrying on, and lately carrying on, at Newcastle-upon-Tyne, the trade and business of bankers in England, according to the provisions of the statute 7 G. 4, c. 46; that, on or about the 26th of January, 1846, the said co-partnership suspended their payments and ceased to carry on such their trade or business of bankers, and were, as the deponent verily believed, *in a state of utter and hopeless insolvency*; that, on the 11th of March last, the deponent, as the attorney for the plaintiff, and by his direction, caused a writ of summons to be issued against the defendant, Daniel Mackenzie,—who appeared from the return made on the 14th of August, 1846, to the commissioners of stamps,

by the said banking company or co-partnership, under schedule (B.) of the 7 G. 4, c. 46, to be, and then was, one of the registered public officers of the company, in such capacity of public officer as aforesaid,—to enforce payment of the principal sum of 14,000*l.*, and interest due from the company to the plaintiff upon a promissory note of the company, dated the 26th of January, 1845; that, on the 12th of April last, the plaintiff duly recovered final judgment against Mackenzie as such registered public officer as aforesaid, for 29,363*l.* 1*s.* 8*d.* for debt, and 7*l.* 4*s.* 6*d.* for his damages and costs; that, on the 18th of April, aforesaid, the deponent caused to be issued out of this court a certain writ of *testatum fi. fa.* on the said judgment, (duly grounded on a writ of *fi. fa.* directed to the sheriff of Middlesex, being the county wherein the venue was laid,) and which said writ of *testatum fi. fa.* was tested on the said 18th of April, and directed to the sheriff of Surrey, in which county Mackenzie resided, in order to obtain payment from Mackenzie, as such public officer *as aforesaid, of such debts and damages as aforesaid, to [*707 which writs the sheriffs returned *nulla bona*; that the paper-writing thereunto annexed, marked A., was a certified copy, under the hand of one of the commissioners of stamps and taxes, of the return or account filed at the stamp-office, London, in pursuance of the statute, between the 28th of February and the 25th of March last, of the names and places of abode of all the persons at the time of such return concerned or engaged as partners in the said banking company, since which time no other persons, as the deponent believed, had entered into the same; that, on the 22d of April last, a *scire facias*, directed to the sheriff of Middlesex, was duly issued against John Bell, Gilbert Forster Hunter, Daniel Mackenzie, John Marshall, Philip Marshall, Walter Scott, and John Willson, being seven of the persons entered in the last-mentioned return, as members, for the time being, of the said co-partnership, for the purpose of obtaining execution, against the same several persons respectively, of the judgment so obtained against Mackenzie as such public officer as aforesaid, and which said writ of *scire facias* was returnable on the 28th of April then next following; that the *scire facias* was duly lodged at the office of the sheriff of Middlesex, and left there four clear days before the return day thereof; that, on the 12th of May last, a judge's order was obtained for final judgment upon the *scire facias* against six of the above-named individuals, they, or any or either of them, not having appeared to the said writ; that final judgment was, on the 14th of May, signed against those six persons for want of appearance, and against the seventh (who had appeared) for want of a plea; that on the 1st of May last, a *scire facias* was duly issued against George Tallentire Gibson and Smith Hobart, two other members, for the time being, of the said co-partnership, which writ was duly lodged at the *office of the sheriff of Middlesex; that [*708 Gibson and Hobart having respectively appeared to the *scire*

facias, a declaration was, on the 19th of May, duly delivered to their attorneys or agents respectively, and, on the 28th, judgment for want of a plea was duly signed against them; that writs of *feri facias* and *testatum feri facias* were duly issued against the said several persons, and delivered to the respective sheriffs of the proper counties; that to certain of these writs, the respective sheriffs had returned *nulla bona*, and to the others no return had yet been made,^(a) but that the deponent had reason to believe, and did believe, that no part of the said debt and costs recovered against Mackenzie, would or could be obtained from any or either of the said several defendants against whom respectively the last-mentioned writs of *feri facias* and *testatum feri facias* were directed; that since the issuing of the *scire facias* against Bell, Hunter, D. Mackenzie, John Marshall, Philip Marshall, Scott, and Willson, two of them, viz. John and Philip Marshall, had sold all their effects; that, since the issuing of the *scire facias* against Gibson and Hobart, the former had executed a bill of sale of all his effects, to secure a debt due to The East of England Joint-stock Banking Company; that the sheriff had levied 100*l.*, and that his real property was subject to mortgages exceeding its value; that Hobart had also assigned all his effects for the benefit of certain creditors; that Hunter and Willson were possessed of no property whereon execution could be levied; that the deponent had received instructions from the plaintiff to take proceedings against all the members, for the time being, of the said co-partnership, from whom it was probable that any part of the said debt and costs could be ob-

*709] tained, *without favour or partiality, and that, to the best of his judgment and ability, he had followed such instructions; that the persons named in the return annexed to the affidavit, as the members or partners in the said banking company, were fifty-four in number; that the deponent had made very diligent inquiries with a view to ascertain the actual position in life of such persons, and their ability to pay the debt and costs in this cause; that the deponent had been informed, and believed, that eight of the several persons included in the said return (naming them) were respectively deceased at the time of such return being made, and that they were all persons in poor circumstances, and possessed of but little means or property; that nine others were respectively resident out of the jurisdiction of the court; that seven others were domestic or other servants; that one other was matron of a lunatic asylum; that eight others had lately been bankrupt, or had assigned away their effects; that two others had ceased to be members of the co-partnership since the said return; that one other was a small cooper; that one other was a pitman or labourer at a foundry; that one other was a clerk or porter to a merchant; that one other was a pauper; that three others were excisemen; that one other was a married woman, whose husband was a small tradesman, that one other was

(a) By affidavits filed subsequently, there also appeared to have been returned *nulla bona*.

clerk at a bank; that one other was an engineer, and believed to be insolvent; that one other was not worth 10*l*.; and that one other was a clerk with a salary of 20*s*. per week.^(a) The affidavit then went on to state, that, on the 30th of April, 1846, John Brooke recovered a judgment in the Court of Exchequer against John Bell, as and being one of the then public officers of The Newcastle-upon-Tyne Joint-stock Banking Company, for 27,576*l*. 13*s*. *10*d*. debt, and 37*l*. 11*s*. 2*d*. costs; that, on the 8d of March last, a judgment was obtained in the [710 Court of Queen's Bench, by Henry Harvey, the public officer of The London and Westminster Banking Company against the said Walter Scott, as one of the public officers of The Newcastle-upon-Tyne Joint-stock Banking Company, for 186,701*l*. 0*s*. 8*d*. debt, and 23*l*. 11*s*. costs; that another judgment had been recently obtained against the said Walter Scott, as such public officer as aforesaid, for 18,490*l*. damages, and costs, by Stanley Dodgson, the public officer of the bank of Whitehaven, in the Court of Exchequer; that several other actions are pending against the said Newcastle-upon-Tyne Joint-stock Banking Company, to recover large debts or sums of money; that the said Stanley Dodgson, as such public officer as aforesaid, had recovered final judgment on *scire facias* upon the aforesaid judgment so obtained by him against the said Walter Scott, against six of the members, for the time being, of the said Newcastle-upon-Tyne Joint-stock Banking Company, and had issued executions against them, without being able to obtain sufficient to pay the costs of the proceedings; that attempts had been made by other creditors of the said banking company, who had obtained judgment against the shareholders thereof for the time being, to levy their executions upon their property, but that none had been found to answer the same: that the debt and costs in this cause were still wholly due and unpaid, and that there was no defence against the payment thereof; that all the present members of the said co-partnership together were unable to pay the debt and costs in this cause, and that the creditors of the said co-partnership would all lose their respective debts, unless they were allowed to proceed, under the statute, against the retired members or shareholders; that, in the annual return made to the commissioners of stamps *by the said banking company, under schedule (A.), [711 between the 28th of February and the 25th of March, 1844, of the names and places of abode of all the partners then concerned or engaged in the said banking company, the following persons appeared, who were then, as the deponent believed, severally members of the said banking company, or co-partnership, that is to say, John Brooke, Benjamin Beverley, Eliza Ann Beverley, (since married to William Pawson,) Matthew Bateson Beverley, John Ridley, the younger, and Joseph Stocks; that, in the annual return made to the said commissioners of stamps by the said banking company, between the 28th of February

(a) Making in all forty-seven persons.

and the 25th of March, 1845, the name of the said Joseph Stocks was omitted; that, in the return made between the 28th of February and the 25th of March, 1846, the names of John Brooke, Matthew Bateson Beverley, and Eliza Ann Beverley, were omitted; that, in the return made between the 28th of February and the 25th of March, 1847, the names of Benjamin Beverley and John Ridley the younger were omitted; and that, by such several omissions, the said several persons whose names were so respectively omitted, ceased, as the deponent believed, to be members of the said banking company.

Martin, on moving for the rule, prayed that it might be drawn up to show cause at an earlier period than the ordinary practice of the court would warrant; assigning as a reason, that otherwise the three years limited by the 13th section of the statute for proceeding against persons who were shareholders at the time of the contract, might expire before the judgment could be made available against them.

WILDE, C. J. I do not think we have any power to shorten the time ordinarily allowed for showing cause *against a rule, for the *712] mere purpose of depriving the parties of a defence which the statute has given them.

Martin. The courts have on various occasions amended writs of summons, in order to save the statute of limitations.

MAULE, J. In the case of the statute of limitations, the party previously liable avails himself of a statutory discharge. Here, it is sought to impose upon the parties a liability which the statute says they shall not be subjected to after the lapse of a given period. The rule must be drawn up in the usual way.

June 11. *W. H. Watson* and *Sir John Bayley*, on behalf of Benjamin Beverley, *Channell*, Serjt., and *Cowling*, on behalf of Joseph Stocks, and *Bramwell*, on behalf of John Ridley, now showed cause. (a) The parties *713] against whom the *scire facias* is prayed, are, by the 13th section of the 7 G. 4, c. 46, (b) only made liable for the *engagements

(a) The rule as to John Brooke was enlarged, on the ground that he had not been served in time to enable him to answer it.

(b) Which enacts "that execution upon any judgment in any action obtained against any public officer, for the time being, of any such corporation or co-partnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members, for the time being, of any such corporation, or co-partnership; and that, in case any such execution against any member or members, for the time being, of any such corporation or co-partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements, in [on] which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last-mentioned, shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained; and which motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership."

of the co-partnership, upon its being shown to the satisfaction of the court, that execution has ineffectually issued against all the members for the time being,—who are primarily liable,—or that substantial and *bona fide* endeavours have been made, to obtain an available execution against them. In *Eardley v. Law*, 12 Ad. & E. 802, where the plaintiff had only sued a registered officer of the banking company, who had suffered judgment by default, and execution had thereupon issued, to which *nulla bona* was returned, and it appeared that the banking company had stopped payment, that several executions had issued against the registered officers, and that *thirty* of the members had become bankrupt; and the plaintiff deposed that there were not, to his knowledge, goods of any of the then present members, on which a levy could be made, and that he had used every means in his power to gain information as to their present solvency, and believed that execution against them would be ineffectual; but it was sworn on the other side (on information and belief) that there were then *one hundred and thirty-one* members of the co-partnership, and that several of them (among whom were sixteen mentioned by name) were fully solvent, and that the company had assets;—it was held that sufficient ground was not shown for a *scire facias* against former members. LITLEDALE, J., there says: “The statute 7 G. 4, c. 46, s. 13, says, that on judgment being obtained against the registered officer of a company within the act, execution shall issue against any member or members for the time being. *It is not considered right, in the first instance, that persons [714 formerly partners, but who have left the company, should continue always liable. But they are not wholly discharged: for, if the debt cannot be levied on those who remain members, the former members may be subjected to execution by leave of the court, on motion; which motion it is now settled, (a) in the case of persons not parties to the record, must be for a *scire facias*. To ground such an application against those parties, it must be shown that proper proceedings have been taken against some who are actually members. Here, no step has been taken but against the registered officer, who was insolvent; and as to him it is not shown that any previous inquiry was made: the sheriff’s return of *nulla bona* is considered sufficient. I do not say that it is necessary to proceed to execution against *all* the continuing members; but enough has not been done here.” And COLERIDGE, J., says: “The statute distinguishes between the class of persons primarily, and the class secondarily, liable. The last are to be called upon only after certain proceedings have been taken against the first. Mr. *Wightman* was compelled to admit, that, according to his view, the proceedings against the first were to be taken almost *pro forma*. But that stultifies the act. It is clear, that, for proceeding against the second class of

(a) Vide *Bosanquet v. Ransford*, 3 P. & D. 298; *Cross v. Law*, 6 M. & W. 217; *Whittenbury v. Law*, 6 N. C. 345, 8 Scott, 661; *Ricketts v. Bowhay*, 3 Man. Gr. & Scott, 889.

persons, leave must be obtained from the court; but, if, to warrant the proceeding, a formal act only, and nothing substantial, were required, the provision as to leave would be unnecessary. Something real must have been done, and *bonâ fide*, before a plaintiff can ask for his remedy against the persons secondarily liable." [MAULE, J. It is precisely on *715] that principle that the affidavit upon which this rule was *moved, professes to be framed.] The affidavit is extremely loose and unsatisfactory. As to some of the parties who were members for the time being, it is sufficiently shown that execution against them has been ineffectual for obtaining satisfaction of the judgment; but it is not shown that execution has issued against all who were not utterly destitute: and, doubtless, if execution had issued promptly against several of those who are stated to be insolvent, or in humble circumstances, *something* might have been obtained from each. [WILDE, C. J. How can we say that execution has been "ineffectual," where no execution at all has issued? It by no means follows that an execution against a man would be ineffectual, because he is insolvent.] The court ought to be clearly satisfied that the means of the parties primarily liable have been completely exhausted, before they allow execution to issue against those whose liability was only to arise upon the default of the members of the first class. And this is the only stage of the proceedings in which that inquiry can be entered into. [MAULE, J. Might you not plead to the *scire facias* the fact that the plaintiff had proceeded against a member of the first class, and obtained satisfaction? and, if so, might you not also plead that the plaintiff had neglected to take due means for obtaining satisfaction from the members for the time being?] That clearly would not be a good plea. [MAULE, J. The *scire facias* calls upon the party to answer. Surely he may answer.] To charge these parties, it must be shown that they were members of the co-partnership within three years from the present time, either by the returns filed pursuant to s. 4, (a) or *by a *positive* oath of the fact. Neither is *716] done here; and therefore the case is free from the difficulty that

(a) The 4th section enacts, "that, before any such corporation or co-partnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked A. to the act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or co-partnership, and also the names and places of abode of all the members of such corporation, or of all the parties concerned or engaged in such co-partnership, as the same respectively shall appear on the books of such corporation or co-partnership, and the name or firm of every bank or banks established or to be established by such corporation or co-partnership, and also the names and places of abode of two or more persons, being members of such corporation or co-partnership, and being resident in England, who shall have been appointed public officers of such corporation or co-partnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter [s. 9] provided, and also the name of every town and place where any of the bills or notes of such corporation or co-partnership shall be issued by any such corporation, or by their agent or agents; and every such account or return shall be delivered to the commissioners of stamps, at the stamp-office in London, who shall cause the same to be filed and kept in the said stamp-office, and an entry and registry to be thereof

*would otherwise have arisen from *Steward v. Dunn*, 12 M. & W. 655, 1 D. & L. 642. It is shown that the names of all the parties against whom it is now sought to proceed, were inserted in a return filed in March, 1844. But that was not a return made pursuant to the statute: it purports to be made by the *cashier*, and not, as it should have been, by one of the *registered public officers* of the copartnership.(a) [MAULE, J. Enough is shown to call upon the parties for an answer.] The plaintiff's own affidavits clearly show that Joseph Stocks, at all events, had ceased to be a member of the copartnership more than three years ago. Besides, assuming that the affidavits are sufficient to show that no available execution could be levied against those members of the first class whose history is given, two remain wholly unaccounted for: and it may be that they are perfectly solvent, and able to satisfy the plaintiff's judgment. [*717]

*June 12. *Martin and Hugh Hill*, in support of the rule. The objections urged on the other side are substantially two—first, that it is necessary to sue out execution against *all* the members for the time being, before recourse can be had against former members—secondly, that the affidavits upon which the rule was obtained, do not show that reasonable diligence has been used to obtain satisfaction of the judgment from such former members. [*718]

Before the passing of this act, the sole privilege of issuing notes, was, made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf; and which book or books any person or persons shall from time to time have liberty to search and inspect, on payment of 1s. for every search."

And the 6th section enacts, "that a copy of any such account or return, so filed or kept and registered at the stamp-office as by the act is directed,—and which copy shall be certified to be a true copy, under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners,—shall, in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or co-partnership were members thereof at the date of such account or return."

And s. 8 enacts, "that the secretary, or other officer, of every such corporation or co-partnership shall, and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in manner herein-before directed, and cause to be delivered to the commissioners of stamps as aforesaid, a further account or return according to the form contained in the schedule marked B. to the act annexed, of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or co-partnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or co-partnership, &c., &c.; and such further accounts or returns shall, from time to time, be filed and kept, and entered and registered at the stamp-office in London, in like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made."

(a) Section 5 enacts, "that such account or return shall be made out by the *secretary*, or other person being one of the public officers appointed as aforesaid, [s. 4,] and shall be verified by the oath of such secretary or other public officer; and that such account or return shall, between the 28th day of February and the 25th day of March in every year, after such corporation or co-partnership shall be formed, be, in like manner, delivered by such secretary or other public officer as aforesaid, to the commissioners of stamps, to be filed and kept in the manner, and for the purposes, as hereinbefore mentioned."

by law, vested in the Bank of England. This exclusive privilege they agreed to forego upon the terms contained in the statute. The first section enacts "that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up, by the corporation or copartnership, of which such person shall be a member, such person being a member at the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up, of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes, is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding." The parties against whom this application is made, are the parties declared liable by this section: and there is nothing in any subsequent clause to vary that liability. To entitle a plaintiff who has obtained a judgment against the public officer of the copartnership, to a *scire facias* against members at the time of the contract, or of the judgment, it is *719] only necessary to sue out *execution against *one* member for the time being, and to satisfy the court that such execution was *bond fide* issued, and that no available execution could be obtained against the rest of that class; the intention of the act being that the funds of the corporation might, by that means, be come at, before resort is had to the funds of the individual members. This is apparent from section 12, which enacts, "that all and every judgment and judgments, decree or decrees, which shall at any time after the passing of the act, be had or recovered or entered up as aforesaid, in any action, suit, or proceedings, in law or equity, against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership," &c. Here, the existence of partnership effects is negatived. To hold, that execution must issue against every member for the time being, before resort can be had to former members, would be giving an effect to the 18th section that is at variance with the ordinary meaning of the words used in it, and contrary to the rule laid down by PARKE, B., in *Becke v. Smith*, 2 M. & W. 195. All that was decided in *Eardley v. Law* is, that before granting a *scire facias* against former members, the court is to be reasonably satisfied that honest and *bond fide* attempts have been made to obtain satisfaction of the judgment from those who, by the statute, are made primarily liable,—viz., the members for the time being,—and that the proceeding is not illusory. The affidavits in answer to the rule in that

case showed that there were several members against whom execution might have issued with effect. Nothing of the kind appears here.

*Exception is taken to the return filed at the stamp-office, on the ground that the person by whom it was made was not the officer indicated by the statute. But he was a person who had means of knowledge on the subject: and it is to be observed that the return is only one medium of proof, and that none of the parties, with the exception of Stocks, has ventured to swear that he was not a member of this copartnership at the time of the contract. [*720

With respect to Stocks, the case stands thus:—He is entered as a member in the return filed at the stamp-office in March, 1844. Another return appears to have been made in November, 1844, in which his name was not inserted. And his name is also omitted from the return made between the 28th of February and the 25th of March, 1845. And the note in respect of which this judgment was obtained bears date the 22d of March, 1845. But his name does not appear in any return of persons who have ceased to be members, made under schedule B.; nor does he, by his affidavit, disclose at what time he ceased to be a member. At all events, no prejudice will accrue from the *scire facias* issuing against him also: he will not be concluded by it.

The omission to account for two of the fifty-four members for the time being, was evidently a mere mistake, which is sufficiently cured by the general allegation in the affidavit, that all practical means have been *bona fide* used to obtain satisfaction from the parties liable in the first instance, but without success.

WILDE, C. J. The majority of the court are of opinion that this rule should be made absolute for a *scire facias*. For my own part, I must confess I have considerable doubt: but I entertain too much respect for my learned brothers not to distrust my own individual judgment, when opposed by their united and deliberate opinion. And, as it is important for many reasons that *the parties should not be delayed, I con- [*721
cur in thinking that the *scire facias* should issue.

The first point which has been made the subject of contest before us, is, whether the parties against whom it is sought to issue the writ, are sufficiently shown to have been members of the company or co-partnership in question, at the time necessary for the purpose of the *scire facias*, namely, at the time when the contract was entered into, upon which the judgment against the public officer was obtained, or at the time of the judgment. This depends upon the affidavit of the plaintiff's attorney, who swears that he is informed and believes that these several persons were members of the co-partnership at that time: and he goes on to state the nature of the information and the grounds of his belief. Now, it was the duty of the bank to make returns to the commissioners of stamps, in London, of the names and places of abode of the members of the co-partnership, as they appeared on the books,

and also of the retired members. And, accordingly, a return is found at the proper office, upon the oath of the cashier of the bank, containing the names of the several parties against whom this application is made, who appear to have been at that time members of the co-partnership. And it is upon this information, so given by a person having such means of knowledge, that the attorney grounds the belief to which he deposes. There is no return of any of those persons having ceased to be members. But, in November, 1845, there is a return filed,—not at a period, or under circumstances, to make it a return under the statute,—which does purport to contain the names of the whole of the then members of the co-partnership. Whatever the effect of that return may be, it is not a return made pursuant to the act of parliament. The question, therefore, is, whether a sufficient *prima facie* case has *722] been made out, on the *part of the plaintiff to justify the court in permitting a *scire facias* to be issued, that is, to put the matter in a course of inquiry. None of the parties against whom the *scire facias* is prayed have ventured to swear that they were not members of the co-partnership at the time of the contract in respect of which the judgment was obtained. Considering, therefore, that the object of the writ is merely to enable the plaintiff to litigate his rights, and that the parties sought to be affected by it are not thereby concluded, the court is of opinion that enough has been shown to entitle the plaintiff to the rule, so far as this first point is concerned.

The next question is, whether the plaintiff has duly observed all the requisites of the statute, and brought before the court the necessary materials to satisfy it that reasonable diligence has been used by him to work out satisfaction of the judgment against the members of the co-partnership, for the time being. It appears that he has issued several writs of *feri facias*, which have been returned *nulla bona*: and this is fortified by the affidavit of the attorney, who swears that “he received instructions from the plaintiff to take proceedings against all the members for the time being of the said co-partnership, from whom it was probable that any part of the said debt and costs could be obtained, without favour or partiality; and that, to the best of his judgment and ability, he had followed such instructions.” The first question is, whether it is necessary, in order to give the plaintiff a *locus standi*, to issue writs of *feri facias* against *all* the members for the time being,—and I do not apprehend that there can be much difference between issuing execution against one only, and issuing it against any number of the members short of the whole,—or whether it is enough to do as the plaintiff has here done. I own I have considerable doubt whether the *723] plaintiff is shown to have done enough. The *rest of the court, however, think that sufficient has been done to bring the parties before the court. It would not be useful, at this late period of the term, to enter at any length into the discussion of matters which cannot

be finally decided to-day, especially as the parties will not be precluded, by our making this rule absolute, from litigating their rights, whatever they may be. It is enough, therefore, to say, that, in the opinion of the majority of the court, the plaintiff has done enough, in this respect, to entitle himself to the rule he asks.

The next question is—do the facts that are presented to the court upon the affidavits, warrant the belief that the plaintiff has done all he could reasonably be expected to do to work out satisfaction of his judgment against the parties made primarily liable by the statute? The names of all the several parties are given, with the exception of two. As to some, it is shown that writs of *fiery facias* have been issued, without producing any fruits. As to others, their situation in life is deposed to, with the grounds upon which the deponent rests his belief that any proceeding against them must prove futile. No affidavit is offered in answer; nor is it suggested, in answer to this rule,—and the fact is much, and very properly, relied on by the counsel who supported the rule,—that there is any one individual of the first class from whom there was any reasonable ground for expecting to obtain satisfaction. That being so, the court think the plaintiff is entitled to issue his writ of *scire facias*.

This is a very important part of the case, inasmuch as the opinion of the court is, in all probability, conclusive on the parties, as to whether or not due means have been taken to obtain satisfaction of the judgment from the members for the time being. Bearing that in mind, the court, after a careful consideration of all the facts, has come to the conclusion I have already stated.

*Another question is, whether Mr. Stocks stands in a different position from the other persons against whom the motion is directed. They are all of opinion that he does not. As to him, it appears that his name was inserted in the return of the existing members of the co-partnership, made to the stamp-office, pursuant to the act, in 1844; but that it was omitted from the return made in the following year. Whether the effect of that omission is, to discharge him from a liability that otherwise would attach to him, is a matter that is very fit to be considered. The affidavit, however, upon which the rule is moved, we think sufficiently covers Mr. Stocks; and therefore the rule will comprise him as well as the other six. [724

With respect to the two persons, members for the time being, as to whom no account is given,—whether this has arisen from mistake, or otherwise, we have no means of ascertaining. Notwithstanding these two persons are unaccounted for, my learned brothers think, that, as the plaintiff's attorney swears generally that he has used all practicable means, to the best of his judgment, honestly to obtain satisfaction against all the parties liable in the first instance, the omission of these two ought not to preclude the plaintiff, or prevent the general inference

arising from the other parts of the affidavit, that all due means have *bond fide* been taken to obtain satisfaction.

Upon the whole, therefore, the court is of opinion that the rule should be made absolute against all the parties except Brooke, as to whom the rule stands enlarged. Rule absolute.

*725] *Nov. 4. *Channell*, Serjt., on behalf of Joseph Stocks, in Michaelmas term, 1847, obtained a rule calling upon the plaintiff to show cause why the rule of the 12th of June, and all proceedings had thereon, should not be set aside, with costs, on the ground of the improper suppression by the plaintiff of material facts which ought to have been disclosed.

The motion was founded upon affidavits which stated, that, since the above rule was made absolute, the solicitor for Stocks had ascertained and believed, that, by an indenture bearing date the 26th of July, 1842, and made between one T. C. Gibson, of the one part, and W. Nesham and R. Todd, therein described as trustees of The Newcastle-upon-Tyne Joint-stock Banking Company, of the other part,—reciting a bill of sale from the sheriff of Durham to the said T. C. Gibson of a leasehold colliery called Hunwick Colliery, situate in the said county of Durham, consisting of 712 acres, and Newfield Colliery, also situate in the said county, consisting of 67 acres, together with certain engines, engine-house, &c., and that improvements had been made and moneys expended, &c.; and also reciting that the said T. C. Gibson had opened an account with the said banking company, in respect whereof they required to have security,—it was witnessed that the said T. C. Gibson did thereby assign and transfer to Nesham and Todd, as such trustees, and their representatives, all the estate and property comprised in the said bill of sale, and thereinbefore mentioned, with their appurtenances, as security to the said banking company, in respect of the said account, to the amount of 20,000*l.* and interest; that the said indenture contained a proviso for redemption, on payment of 20,000*l.* and interest; that the deponent had also ascertained and believed, that, by an indenture bearing date the

*726] 28th of February, 1845, and made between Nesham and *Todd, as trustees of the said banking company, of the first part, the said Todd and Nesham, T. C. Gibson, and Smith Hobart, therein described as directors of the said banking company, of the second part, T. C. Gibson of the third part, and the plaintiff Field of the fourth part,—reciting the first-mentioned indenture, and that the sum of 20,000*l.*, with arrears of interest, remained due thereon, which the said T. C. Gibson had been called upon to pay, but that it was not convenient to him to pay the same; and also reciting that the parties thereto of the second part had, with the privity of the said T. C. Gibson, applied to Field to advance them 14,000*l.*, and that he had agreed to do so, upon having

the repayment thereof, with interest at 5 *per cent.*, secured by the promissory note of the said banking company, and collaterally secured by an assignment of their mortgage security from the said T. C. Gibson for 20,000*l.*, and also by a mortgage from the said T. C. Gibson, with power of sale, of a freehold messuage, farm, and lands called Newfield, in the county of Durham, containing 150 acres of land, with coal and other minerals in and under the same, for the purchase whereof the said T. C. Gibson had contracted, and had paid part of the purchase-money; and also reciting that Field had paid the sum of 14,000*l.* to the said banking company, and that the said banking company had, by a promissory note made at Newcastle-upon-Tyne, and bearing even date with those presents, promised to pay to Field, or his order, 14,000*l.*, at the expiration of six calendar months, with interest at 5 *per cent.*, for value received, and that the said promissory note had been delivered by the directors of the said banking company to Field,—it was witnessed, that, in consideration of the said 14,000*l.*, Nesham and Todd did, with the consent of T. C. Gibson, and by the direction of the said directors of the said banking company, bargain, sell, *assign, and transfer [*727 the said principal sum of 20,000*l.* and arrears of interest due upon the said mortgage security, and also the hereditaments and premises therein mentioned and particularly set forth, subject, nevertheless, to redemption by the said banking company, on payment by them, or by the said T. C. Gibson of the said sum of 14,000*l.* and interest; that the said indenture contained a covenant by Field not to call in or require payment of the said sum of 14,000*l.* until the expiration of five years from the date thereof, provided the interest thereon should be regularly paid every half year, or within a month after; that the deponent had been informed, and believed, that, on or about the 16th of April now last past, Field, under the power contained in that indenture, served the said banking company, or the public officers or agents thereof, with a notice of sale of the mortgaged property; that, at the time the rule of the 12th of June was made, the deponent and Joseph Stocks were perfectly and entirely ignorant of the existence of the said mortgage security to Field for his debt against the said banking company, or of his being the holder of any kind of security in respect thereof, save as appeared by the affidavit upon which the said rule was applied for; that, had they been aware thereof, the facts and circumstances connected therewith, would have been brought forward in answer to the application for the said rule; that the deponent had been informed, and believed, that one John Brooke holds a second mortgage upon the said hereditaments and premises mentioned and assigned in the indenture of the 28th of February, 1845, for 30,000*l.*; and that the deponent had also been informed, and believed, that the said assigned hereditaments and premises were of considerable value, and that, by management and care, the same might be made productive and valuable to an amount greatly

*728] exceeding the sum of 20,000*l.* *for which the same were, as aforesaid, mortgaged to the Newcastle-upon-Tyne Joint-stock Banking Company. Stocks also made an affidavit that he was not aware of the mortgage security when cause was shown against the former rule, and that, had he been aware of its existence, he would have called the attention of the court to it.

Nov. 13. *Martin and Hugh Hill* showed cause, upon affidavits stating, amongst other things, that, in the mortgage security of the 28th of February, 1845, was contained the following proviso:—"Provided always and it is hereby expressly understood and agreed between and by the parties hereto, that it shall not be in any manner incumbent upon the said J. Field, his executors, &c., to adopt or resort to any proceedings at law or in equity, or otherwise, for recovering or compelling payment of the said mortgage debt of 20,000*l.* hereinbefore assigned, or the interest due or to become due thereon, or for putting in force any of the securities for the same, other than such proceedings only (if any) as he or they shall in his or their free and unfettered discretion think fit;" that, in the present embarrassed state of commerce in general, and particularly of the mining districts, it would not be possible to find a purchaser for the said colliery, and that any prospective value to be derived therefrom would be destroyed by an unsuccessful attempt to sell the same; and that, at the time of making the application for the *scire facias*, the deponent (the plaintiff's attorney) fully believed that Joseph Stocks was aware of the existence of the mortgage.

The facts of the case are shortly these:—The plaintiff lent 14,000*l.* to the bank in February, 1845, when Stocks was a member of it. Having obtained judgment for that debt against one of the registered public officers of the copartnership, the plaintiff sued out executions against *729] certain of the members for the time being, and *reasons satisfactory to the court were given why it would have been fruitless to issue executions against the others: and, upon that state of facts, the court, in the exercise of its discretion, allowed a writ of *scire facias* to go against certain of the former members. It is now suggested that the circumstance of the plaintiff's having, at the time of the loan, obtained, by way of collateral security, an assignment of a mortgage of a colliery, would, if disclosed to the court upon the motion for the *scire facias*, have induced them to decline to allow the writ to issue. There is no suggestion that the suppression of that fact was fraudulent; and the affidavits in answer show that it was quite unintentional, and that the mention of such fact would not have influenced the decision of the court. It appears also that Brooke, one of the parties to the former rule, was perfectly aware of the mortgage. The question is, whether, upon the proper construction of the 12th and 13th sections of the 7 G. 4, c. 46, a person who takes from a joint-stock banking company, a collateral security of this sort,—he expressly stipulating that he shall be at liberty to

avail himself of it, or not, as he may think fit,—is compellable to realize that security, before he can proceed, by *scire facias*, against one who was a member at the time of the contract: and that, where the security can only be made available in a court of equity, and the time necessary for prosecuting that remedy would, in all probability, exhaust the three years which form the limit of the liability of members of that class. One who lends money upon the promissory note of a joint-stock bank, and takes a collateral security upon land, has the same rights as the creditor of any other person has; and the members of the copartnership incur the same liabilities that would attach upon any other partners in this respect. The creditor is not bound to avail himself of the mortgage security. The obvious meaning of the 12th section of *the statute is, that the judgment against the public officer shall have [*780 the same effect as a judgment against an ordinary trading partnership; and the only condition precedent to the right to resort to former members upon a judgment so obtained, is, the issuing of a *fi. fa.* against such of the members for the time being, against whom there is any well-founded hope of its procuring satisfaction. The construction put by this court upon the 13th section, in this case, has since received the sanction of the Court of Queen's Bench, in a case of *Harvey v. Scott*, 17 Law Journ., N. S., Q. B. 9. That section contains nothing to warrant the supposition, that a collateral security must previously be realized. To hold that it must, would be legislating, instead of construing the words of the legislature. Suppose the debt were secured by the bond of a stranger, would the plaintiff be bound to sue the surety before he could resort to the members at the time of the contract? [WILDE, C. J. Suppose he held chattels of a third person as collateral security, with a power of sale, would he be obliged to exercise that power before resorting to the shareholders of the second class?] Clearly not.

Channell, Serjt., and *Bramwell*, in support of the rule. The court, upon the former motion, held—that it was not a matter pleadable to the *scire facias*, that due diligence had not been used to obtain satisfaction of the judgment from the members for the time being,—that it was not necessary actually to issue writs of execution against *all* the members for the time being, before recourse could be had to those persons who were members at the time of the contract,—and that it was for the court, in each case, to determine whether due diligence had been used to make the judgment available against the parties made liable in the first instance. In the case *last cited, the Court of Queen's Bench [*781 were satisfied, upon the affidavits, that due diligence *had* been used in that behalf; but they said, that, if there were any fraud or suppression of material facts, it would be open to the parties to come to the court; which is now done.(a) [MAULE, J. You contend that a solvent surety must be first discussed?] Yes. The mortgage in question is assets

(a) See *Fowler v. Richerby*, 9 Dowl. P. C. 682.

of the bank, subject to the plaintiff's claim. [WILDE, C. J. If so, why might it not be sold under a *fi. fa.*? MAULE, J. If you could show that there was property of the bank that could have been taken under a *fi. fa.*, that might afford a good answer to the application for leave to issue a *scire facias* against former members. V. WILLIAMS, J. An equity of redemption, which is all the bank could have had here, is not property that can be taken under a *fi. fa.*] The act never intended to make retired members of the copartnership liable, while there remained any property of the bank, or of any present members, that could be made available to satisfy the judgment. [MAULE, J. The real question is, whether the 13th section contemplates any other mode of obtaining satisfaction than by way of execution, either against the bank or against present members.] That, it is submitted, is too limited a construction of the act. [MAULE, J. You contend, that, the present members being all exhausted, execution ought not to go against retired members, if it appears that the judgment might be satisfied by any proceeding, in equity, or otherwise, against the bank or their public officer?] Would the court allow a *scire facias* against former members to issue, if it were clearly shown that the bank possessed property that might have been made available otherwise than by means of a *fi. fa.*? [MAULE, J. My impression is, that the 13th section means nothing but what the words *732] import. V. WILLIAMS, J. It speaks of *ineffectuality of *execution* only, not of ineffectuality as to getting the money.] Construing the 13th section with the 12th, such a conclusion is hardly warranted. There must obviously be much of the property of a bank that never can be the subject of an execution. The 13th section cannot be construed literally. Can it be said that execution has been ineffectual, when no *ca. sa.* has issued? If that course (a) had been adopted here, the debt might have been satisfied. [MAULE, J. It cannot be necessary to operate upon the compassion of the friends of the parties. WILDE, C. J. It certainly is not necessary to sue out a *ca. sa.*] If the plaintiff had had a sealed bag of sovereigns, to a larger amount than his debt, deposited with him, according to the construction now put upon the act, he might have sued the former members, without availing himself of that security. [MAULE, J. That is a hardship which existed at common law, and it is one that the act was not intended to provide against.] The case presented by the plaintiff on the former occasion, was, that, unless the *scire facias* were granted, the plaintiff would lose the benefit of his judgment. [WILDE, C. J. The affidavits were not very precise in this respect. I observed, at the time, that the statement was not so framed as to pledge the conscience of the deponents very exactly. MAULE, J. If the plaintiff knew that *he* would be paid, the statement would be false, though all the other creditors should lose their debts.] The affidavits are designedly evasive in this particular. *Cur. adv. vult.*

(a) By which alone the concealed property of a debtor can be reached.

WILDE, C. J., now delivered the judgment of the court.

Having carefully considered the affidavits in support of, and against, this rule, we have come to the conclusion *that it should be discharged. The original rule,—which called upon Joseph Stocks and several other persons, to show cause why a *scire facias* should not issue against them, upon the judgment obtained against Mackenzie, one of the registered public officers of the company,—was moved on the ground that the plaintiff had failed to make his execution on that judgment available against the parties primarily liable, viz., the members of the copartnership for the time being. Upon that occasion, an account was given of the circumstances of several of those persons, in order to show that any executions issued against them must be fruitless. Cause was shown against that rule, by Joseph Stocks and certain other parties. Two points were then made, first, that, as a condition precedent to the plaintiff's right to have recourse to former members of the copartnership,—who by the statute are made liable only where the execution against the members for the time being has proved ineffectual,—it was necessary that execution should issue against all the last-mentioned persons; secondly, that it was not shown with sufficient certainty, upon the affidavits filed in support of the motion, that satisfaction of the judgment could not be obtained by other means. Joseph Stocks appeared to resist the rule upon those two grounds. The court did not, upon that occasion, enter into any very minute consideration of the circumstances of the parties, there being no suggestion on the part of those against whom the rule was directed, that there was any one against whom an available execution might have issued; but, under all the circumstances, they thought that execution had issued against all persons against whom the plaintiff was bound to adopt that course: and, the bank being alleged to be utterly insolvent, and that statement being wholly uncontradicted, the rule was made absolute. The object of the present motion is, to reopen that *rule, on the ground of an alleged improper suppression by the plaintiff of certain facts which might have influenced the opinion of the court, and also upon the ground of surprise. The alleged suppression of facts, was, the omission on the part of the plaintiff, to give any account of a collateral security he holds for his debt, viz., a mortgage of a colliery in the county of Durham, which, if disclosed to the court, it is said, would have prevented the former rule from being made absolute. The only statement in the affidavits now before the court, as to the value of this security, and the probable means of obtaining satisfaction from it, is, a short statement at the close of the affidavit of the attorney for Joseph Stocks, that “he is informed and believes that the said assigned hereditaments and premises are of considerable value, and that, *by management and care*, the same may be made productive and valuable to an amount greatly exceeding the sum of 20,000*l.* for which the same were as aforesaid mortgaged and assigned

to the said Newcastle-upon-Tyne Joint-Stock Banking Company." When may it be made productive? and by what means? At some indefinite period, and at a cost which the plaintiff would not be justified in incurring. No present means of obtaining satisfaction are shown. In answer to this general statement, the affidavits read on behalf of the plaintiff, show that the property comprised in the mortgage is so circumstanced, that, if it were now offered for sale, no buyer could be found; that the prospective value would be deteriorated by an unsuccessful attempt to sell; and that the plaintiff is willing to give it up to Mr. Stocks, upon his demand against the bank being paid, or security given for it. If the facts now presented to the court had been stated in the affidavits used on the former occasion, would they have been sufficient to disentitle the plaintiff to his writ of *scire facias*? *We think *785] they would not, and therefore that the suppression, assuming it to have been wilful, of the fact that the plaintiff held such a security, would not, in any degree, have affected our decision. We have looked carefully at the affidavits to see if the suppression was intentional: and we see nothing to induce us to think that it was. The existence of the mortgage security was matter of notoriety. No doubt it would have been proper in the plaintiff to have mentioned the fact in his affidavit on moving for the *scire facias*; but we see no ground for supposing that the information was withheld from any improper motive. Nor do we think there is any ground for saying that Stocks was surprised. He came, on the former occasion, to show that there were means by which the plaintiff might have obtained satisfaction of his judgment, without resorting to the former members of the copartnership. He does not, however, show that he made any inquiry as to the property possessed by the concern. His affidavit merely states that he was not aware of the existence of this particular mortgage, and that, if he had been, he would have called the attention of the court to it. He might have known of it, if he had used due diligence to inform himself.

Upon the whole, therefore, it seems to us, that the suppression was not intentional, and that it was not material in any substantive degree; that there has been no surprise on Stocks; and, consequently, that the present rule must be discharged,—and, as it was moved with costs, it will be discharged with costs. Rule discharged, with costs.

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*TILT v. DICKSON. June 12.

A judgment signed in an action brought by A. in the name of B., having been set aside by a judge's order, a rule nisi was obtained to rescind that order, on the ground that the summons upon which it was made had been improperly altered by the defendant's attorney. This rule,—which, *by mistake*, purported to have been moved on behalf of B.—was discharged upon an affidavit of B., showing that the rule had been moved without any authority from him, and that the alteration in the summons had been made with his sanction:—

Held, that a second application for the same purpose might be made on the behalf of A., the party really interested.

THIS was an action upon a bill of exchange, by drawer against acceptor, brought upon instructions given by one Hemsworth. Judgment having been signed for want of a plea, a summons was taken out on the 13th of October, 1846, in the usual form, calling upon "the plaintiff's attorney or agent" to show cause why the judgment should not be set aside, on the ground that Hemsworth was proceeding without any authority from the plaintiff. Before serving this summons, the defendant's attorney altered it, by making it call upon "the plaintiff, his attorney, or agent" to show cause. The summons came on to be heard before CRESSWELL, J., on the 16th, when the learned judge made an order in the terms of the summons.

On the 15th of January, 1847, a rule nisi was obtained, calling upon the defendant and his attorney to show cause why the above order, and the rule of court thereon, should not be set aside, and why the latter should not pay the costs of the application, on the ground of the improper alteration of the summons by him. This rule purported to be moved on behalf of the plaintiff. Cause was shown on the 29th, when, it appearing that the plaintiff (who made an affidavit to that effect) had given no instructions or authority for the motion, and that the alteration of the summons had been sanctioned by him, the rule was discharged, *although it was attempted to be sustained on behalf [737 of Hemsworth, who was alleged to be the real plaintiff.

Lush, in Easter term, obtained a similar rule, on behalf of Hemsworth.

April 27. *Talfourd*, Serjt., showed cause. [WILDE, C. J. This is a second application having the same object as the former. It is important strictly to adhere to the rule requiring all matters to be brought before the court in the proper shape in the first instance. In *The Queen v. The Manchester and Leeds Railway Company*, 8 Ad. & E. 413, 1 P. & D. 164, Lord DENMAN says: "The rule of practice, if not altogether universal and inflexible, is as nearly so as possible, that the court will not allow a party to succeed, on a second application, who has previously applied for the very same thing without coming properly prepared. We are constantly acting on this principle, of which the convenience and the justice are apparent. I think that every party is to come at first fully prepared with a proper case, and, if he fails to do so, must not afterwards renew the application with an amended case." So, in *The King v. Orde*, 8 Ad. & E. 420, which was there cited, a rule for a *quo warranto* information against a mayor, on the ground that he did not reside as the charter required, was discharged, on affidavits showing residence. Afterwards, a second rule was obtained, on the same ground, on affidavits impeaching the former opposing affidavits, and tending to show that the residence was colourable: and this rule was discharged, on the ground that a second application ought not to have been made.

And in *Rossett v. Hartley*, 7 Ad. & E. 522, n., 5 N. & M. 415, it was
 *738] held, that, if a rule be obtained, and discharged, before the
 *single judge in the bail court, the full court will not allow a
 rule for the same purpose to be discussed before them, though on affi-
 davits discovering facts not previously stated. The court there say:
 "The rule is inflexible. All the grounds on which the plaintiff meant
 to rely should have been brought forward on the original motion." Within
 my own experience, as well in this court as in the Court of Queen's
 Bench, it has always been held that a second application on the same
 subject-matter could not be entertained. It would be extremely incon-
 venient if it were otherwise. In the present case, the original rule was
 moved by Hemsworth in a form which would not, in the event of a failure,
 subject him to costs. If he is entitled to come in his own name, and ask
 to have the order and rule set aside, he should have moved in that form at
 first.] That is precisely the difficulty the defendant was placed in. The
 former rule having been moved for in the name of the plaintiff, there was
 no one else against whom the costs could have been prayed: and the
 defendant could not ask for costs against him, when he was assisting
 him to discharge the rule. In *Ex parte Hasleham*, 1 Dowl. N. S. 792,
 it was held, that, where a rule was discharged for want of an affidavit
 of the attesting witness to the undertaking which it was sought to enforce,
 the application could not be renewed. COLERIDGE, J., there said: "The
 only exception to the rule of not allowing an application to be amended,
 is, where affidavits are improperly intitled, and the rule is discharged
 on that account. There, the same affidavits may be allowed to be re-
 sworn, when properly intitled, and the application renewed. Here, how-
 ever, it is sought to renew the application on amended materials." And
 in *Levi v. Coyle*, *739] 2 Dowl. N. S. 932, where the defendant applied to the
 court to *set aside a warrant of attorney, judgment, and execution, on
 the ground of usury, but the rule was discharged, upon an objection
 that the applicant did not produce a verified copy of the instrument,—
 it was held, that it was not competent for him to come to the court a
 second time, with a like motion, upon the same materials, with the addi-
 tion only of an affidavit verifying the warrant of attorney. That case
 was decided by WIGHTMAN, J., in the bail court, upon the authority of
The Queen v. The Inhabitants of Barton, 9 Dowl. P. C. 1021, where
 it was held, by the full court, that, if a party, through his own neglect,
 makes an application to the court on insufficient materials, and his rule
 is, on that ground, discharged, he cannot afterwards be permitted to
 supply the deficiency, and renew his application. In *Dixon v. Oliphant*,
 15 M. & W. 152, a second motion for an attachment for non-payment
 of costs was allowed; but there there was a fresh demand, and a fresh
 contempt. [V. WILLIAMS, J., referred to the rule of Hilary, 3 Jac. 1, (a)

by which it was ordered, that, "if a cause be moved in court, in the presence of counsel of both parties, and the court shall thereupon make an order, no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel knowingly making such motion, shall not be heard here in any cause during the same term."]

Channell, Serjt., and *Lush*, in support of the rule. The old rule referred to, as well as the modern practice, applies only where the motion is disposed of upon its merits. [CRESSWELL, J. In *The King v. Orde*, and in *The Queen v. The Manchester and Leeds Railway Company*, the original rules had been discharged on technical grounds.] [*740] To justify the application of the rule, the circumstances of the two motions must be the same, the object the same, and the parties must be identical. Here, the first application was expressed to be made on behalf of the plaintiff; the present rule is moved on behalf of Hemsworth. This is not a case of defective materials. [WILDE, C. J. In *The Queen v. The Great Western Railway Company*, 1 D. & L. 874; an application to compel the defendants to pay the costs of a mandamus, was objected to, on the ground that they were wrongly described in the body as well as in the title of the affidavit on which it was moved, as "*The Directors of the Great Western Railway Company*." The application was afterwards renewed, on the same affidavit, corrected so as to properly describe them as "*The Great Western Railway Company*," and the court refused to entertain the second application. A case of *Sherry v. Oke*, 8 Dowl. P. C. 349, was there cited, where a rule to set aside an award, drawn up on imperfect materials, was therefore discharged, and the court, under special circumstances, allowed a new rule. But Lord DENMAN said: "Perhaps the latitude allowed in *Sherry v. Oke* is a little questionable. We do not wish to repudiate our power to entertain a second application; but the general rule on the subject, and on which the court will act in the present case, is laid down in *The Queen v. The Manchester and Leeds Railway Company*, that 'a party after once failing in consequence of a defect in the way in which he brings his case forward, is not entitled to renew the same application.' The only exceptions are, where the defects are in the title or jurat of the affidavit. The rule is a good one, and, as the present case does not come within the exceptions, it must prevail. The court cannot [*741] 'look at the body of the affidavit to see whether or not the alterations are material.]" That was the case of an alteration in the title of the cause. In *Shaw v. Perkin*, 1 Dowl. N. S. 806, a rule having been discharged, on the ground that the affidavit on which it was moved had been sworn before a person who was a commissioner of another court only,—the court allowed the application to be renewed on amended affidavits. [WILDE, C. J. That case was cited by WIGHT-

MAN, J., in *The Queen v. The Great Western Railway Company.*] In *Jeves v. Hay*, 1 M. & G. 390, 1 Scott, N. R. 399, an order for particulars of the defendant's set-off had been made upon a summons erroneously intituled. The defendant thereupon obtained a rule nisi to set aside the order, but, as the rule had inadvertently been drawn up without mentioning costs, the defendant abandoned it, and obtained a second rule, drawn up with costs, after the plaintiff's consent to the first rule's being made absolute in its terms had been communicated to the defendant's counsel. The court, notwithstanding, made the second rule absolute, but directed that the costs should abide the event. [CRESSWELL, J. The case of *The Queen v. Pickles*, 3 Q. B. 599, seems to be very analogous to the present. There, the churchwardens of a parish church, having made a church-rate, obtained a rule nisi for a mandamus to the officers of a township within the parish, to make a rate on the inhabitants of that township, for raising a specified portion of such church-rate. The affidavits showed a custom that the township and another should jointly contribute twice that portion, but did not show how much of the amount was contributable by each. The court discharged the rule, with costs, considering the defect substantial, and refused to *742] mould the rule. The churchwardens having afterwards, *without reference to the former proceedings, obtained a second rule, on fresh affidavits, showing that the two townships contributed in equal portions, the court discharged the rule with costs; and Lord DENMAN said: "I think the case is exactly within the rule, which is a very wholesome one. Public officers are at least as much bound as private individuals, to come prepared with proper materials in the first instance."] There, the first rule was discharged on the merits. [CRESSWELL, J. The court evidently acted upon a different impression. Here, you obtain a rule professing to move on behalf of Tilt. Tilt comes and repudiates it. You then tell us that you move on behalf of Hemsworth, who is the real plaintiff. The court decide that Hemsworth has mistaken his course, and has no right to sustain a rule in that form. Has he a right to come again? I think you are clearly within the cases.]

WILDE, C. J. The question is important, and it is one of very general application. Not wishing to lay down, without consideration, a practice from which we should not be disposed to depart, we think the rule should be discussed upon the merits, and, if necessary, we will reserve this point, and intimate our opinion upon it, at a future day.

Counsel having accordingly been heard in support of, and against, the rule,

WILDE, C. J., said:—The ground upon which the rule in this case is impeached, is, that it was obtained by means of an unauthorized alteration by the defendant's attorney of the summons, which rendered it necessary only to serve it upon the plaintiff,—who, it is suggested, is

acting in collusion with the defendant,—and not upon the plaintiff's attorney. There was a *palpable motive for the alteration. Upon the merits, therefore, we think the ground of the motion is made out. [*743]

Cur. adv. vult.

WILDE, C. J., now delivered the opinion of the court upon the point reserved.

When this matter was before the court last term, we expressed our opinion upon the general merits of the motion, but took time to look into the authorities as to a particular point, *viz.* the right to make a second application under the circumstances. It appeared that the action was brought by one Hemsworth, in the name of the plaintiff Tilt; that, judgment having been signed, application was made to a judge at chambers, to set aside the judgment, on the ground that Hemsworth was proceeding without any authority from the plaintiff; and that the summons, which was granted in the usual form,—calling upon the plaintiff's attorney or agent to show cause,—was altered by the defendant's attorney, so as to exclude the necessity of serving it upon the plaintiff's attorney. In Hilary term last, a rule was obtained to rescind the order obtained upon that summons. The court was of opinion that the rule should be made absolute on the ground of the improper alteration of the summons: but, inasmuch as the rule had been drawn up as moved on behalf of the plaintiff, and it appeared, on showing cause, not only that the plaintiff had not authorized the application, but that he had sanctioned the alteration of the summons, the rule was discharged. In the following term, a second rule was obtained, on behalf of Hemsworth, having the same object as the former rule. Upon showing cause against this rule, it was objected, on the part of the defendant and his attorney, that it was not competent to the court to entertain a second application upon the same subject.

*The rule which prohibits the making a second application upon the same ground that a former unsuccessful one has been made, is one of very considerable importance. [*744] In the first place, it tends to secure regularity and propriety in the mode of making applications to the court. It also protects the party called upon to show cause from being harassed by repeated motions; and it prevents the undue and wasteful occupation of the time of the court. Having carefully looked into the cases, it appears to us that this rule may be made absolute, without in any degree trenching upon any of these considerations. The strict practice has been relaxed in cases where the first application has failed in consequence of a clerical error, or from the affidavits having been incorrectly intitled. And we think this case is analogous to those where the failure has arisen from a mere technical defect, which is wholly beside the merits. It is obvious that the rule was in the first instance moved on behalf of Hemsworth, and that it was, by a mere slip, drawn up as a rule moved on behalf of the plaintiff.

Therefore, the merits being against the defendant, we think the rule should be made absolute.

We do not enter into the question, whether the judgment was properly signed or not.

*745] *DOE d. HARRISON v. HAMPSON. June 12.

The undertakings contained in the common consent rule are *personal*, and binding only to the extent of creating a liability to attachment.

They cannot be enforced by the representatives of a deceased party.

In cases in which a rule of court for the payment of money has the effect of a judgment, under 1 & 2 Vict. c. 110, s. 18, a rule nisi—calling upon the parties to show cause why the amount should not be paid,—is unnecessary.

THIS was an action of ejectment, tried at the spring assizes for Somerset, in 1846, when a verdict was found for the defendant. A rule nisi was obtained in the following term, for a new trial, which was afterwards, on the 1st of February, 1847, discharged.(a)

The defendant died, intestate, on the 25th of November, 1846; and, on the 18th of March last, administration of his estate and effects was granted to his son, Crispin Hampson.

By an order of ERLE, J., made on the 28d of March last, it was directed that judgment should be entered as of the 21st of April then last, and that it should be referred to the master to tax the defendant's costs of the suit. Judgment was accordingly signed, and costs were taxed and allowed upon the consent rule. at 68*l*. 12*s*.

Montague Smith, in Easter term last, on behalf of Crispin Hampson, obtained a rule calling upon the lessor of the plaintiff to show cause, why he should not pay the amount of such costs,—with a view to an execution under the 1 & 2 Vict. c. 110, s. 18. He referred to 2 Wms. Saund. 72 o; *Goodright v. Holton*, Barnes, 119; and *Thrustout v. Bedwell*, 2 Wils. 7.

Butt, on a former day in this term, showed cause. The undertaking in the consent rule, is *personal* only. The case of *Goodright v. Holton* is of no authority: it is directly at variance with the subsequent case of *Thrustout v. Bedwell*, which all the text books cite with *ap-
*746] probation. In *Adams on Ejectment*, 4th edit. p. 280, it is said: "If the plaintiff be nonsuited from the refusal of the defendant to appear at the trial, the executor of the lessor will not be entitled to his costs, for, the consent rule is merely personal:" for which is cited *Thrustout v. Bedwell*. So, in 2 Wms. Saund. 72 c, note (n), it is said: "If the lessor of the plaintiff in ejectment dies after issue joined and before trial, or even after trial and before payment of costs, the defendant cannot recover his costs against the lessor's executor or administrator; for, the consent rule was merely personal, to make the party liable to an attach-

(a) Ante, 267.

ment if he refused to pay the costs.(a) For the same reason, if the lessor of the plaintiff dies before the commission day of the assizes, and the plaintiff is nonsuited on account of the defendant's not confessing lease, &c., the executor or administrator of the lessor cannot recover any costs." The rule is laid down in similar terms in 2 Williams on Executors, 3d edit. 1575, in Hullock on Costs, 647, and in Tidd's Practice, 9th edit. 1243. In *Doe d. Pain v. Grundy*, 1 B. & C. 284, 2 D. & R. 437, the lessor of the plaintiff had entered into the ordinary rule to pay costs. After the commission day, but before the trial, the lessor of the plaintiff died. The cause was tried, and the plaintiff was nonsuited on the merits. A rule nisi was obtained to compel the executor of Pain to pay costs; in answer to which was cited the case of *Thrustout v. Bedwell*: and the court said: "The rule entered into by the lessor of the plaintiff was merely personal, to make him liable to an attachment if he refused to pay the costs. The executor would not be liable to an action for them, *and therefore to grant this motion would be taking, [*747 by a summary mode, a sum of money out of the assets, which the executor could not otherwise be compelled to pay." And the rule was discharged. In *Newton v. Walker*, Willes, 315, an attachment against an administrator, for not performing a rule of court entered into by the intestate, was refused—first, "because the court had no method to enforce the rule, even against the party himself if he had been alive, but by process of contempt, which is personal, and cannot be carried on against the administrator;—secondly, because the administrator may have no assets, and this would be a very improper way of trying that matter; nor would a determination in this case bind the rest of the creditors, nor could it be pleaded to any other demand." The statute 1 & 2 Vict. c. 110, s. 18, cannot alter the nature of the liability on the consent rule. Its object was, merely to substitute a more summary and convenient remedy for the proceeding by attachment. Supposing the lessor of the plaintiff had been still living, the consent rule is not one that could have been enforced by application to the court under this statute: *Jones v. Williams*, 8 M. & W. 349; *Neale v. Postlethwaite*, 1 Q. B. 243; *Hodgson v. Patterson*, 4 M. & G. 333, 5 Scott, N. R. 76; *Doe v. Ballard*, 9 Law Times, 124. The proper course is, to proceed by *scire facias* to revive the judgment in favour of the personal representative.

Montague Smith, in support of the rule. The difficulty in this case, if any, arises from the act of the court, in delaying to give judgment in due course: The only authority against this application is the case of *Thrustout v. Bedwell*, which is a mere *obiter dictum*. [*748 *Goodright v. Holton*, however, is directly in point. There, *costs

(a) Citing *Doe d. Pain v. Grundy*, 1 B. & C. 284, 2 D. & R. 437; *Thrustout v. Bedwell*, 2 Wils. 7; *Doe v. Ford*, 2 J. P. Smith, 407, Roscoe on Real Actions, 607, Adams on Ejectment 3d edit. 335.

taxed upon the common rule by consent, were ordered to be paid by the defendant to the representative of the lessor of the plaintiff, who died after the trial. There is no pretence for saying that what was done there was done by consent. The object of the statute 1 & 2 Vict. c. 110, s. 18, was, to give creditors a more facile remedy than by attachment. [CRESSWELL, J. What writ would you issue, and at whose suit?] A *fi. fa.* at the suit of Crispin Hampson, the administrator of the deceased lessor of the plaintiff. *Cur. adv. vult.*

WILDE, C. J., now delivered the opinion of the court.

This was a rule obtained on behalf of the administrator of the defendant, calling upon the lessor of the plaintiff to show cause why he should not pay the costs taxed upon the consent rule, a verdict having been found against him at the trial. It appears that the defendant died on the 25th of November, 1846, and that judgment has been entered as of Easter term, 1847. It has repeatedly been held that the liability to pay costs under the consent rule in ejectment is merely personal, to be enforced by attachment only, and that it dies with the party. It was so held in *Thrustout v. Bedwell*, *Doe v. Ford*, and *Doe d. Pain v. Grundy*; and the rule is so stated in the several text books to which reference has been made. The only authority opposed to these, is the case in Barnes—*Goodright v. Holton*. We have caused search to be made, and we find that that case is not quite as stated in that report. The rule was not made upon the ordinary consent rule. This motion is founded upon the 18th section of the 1 & 2 Vict. c. 110, which enacts “that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, *749] or of the Court of Review in matters of *bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgment in the superior courts of common law, and the person to whom any such moneys, or costs, charges or expenses, shall be payable, shall be deemed judgment creditors, within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters therein depending in the same courts, shall and may be exercised by courts of equity, with respect to matters therein depending, and by the Lord Chancellor and the Court of Review, in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby(a) given to judgment creditors, are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are, by such orders, or rules, respectively, directed to be paid.” The object of that clause is, not to give to the courts any greater powers than they before possessed, or to make parties liable for costs for which they were not liable before; but merely to give to such rules and

orders the effect of judgments. I cannot discover that it authorizes the court to make the rule here prayed. The consent rule expressly requires the lessor of the plaintiff to pay the costs in the event of a verdict being found for the defendant. Here the defendant has obtained a verdict and judgment, and the costs have been adjudged to him. Assuming that the consent rule has the force of a judgment, then, according to the cases of *Jones v. Williams*, *Doe v. Amey*, 8 M. & W. 565, *Neale v. Postlethwaite*, and *Hodgson v. Paterson*, the motion is unnecessary. And, if it has not the force of a judgment, we are equally without power to do that which is prayed. Rule discharged.

*WELLS v. Baron SUFFIELD. June 12. [*750

It is no ground for setting aside a writ of summons that it is framed as a *pluries* writ, when the *præcipe* is, for an *alias*, or that it is issued against Baron A., without stating his Christian name.

HURLSTONE moved to set aside the *pluries* writ of summons, or the copy and service, on the ground that the process improperly described the defendant as "The Right Honourable Baron Suffield," instead of describing him by his proper title of "The Right Honourable Edward Vernon Harbord, Baron Suffield, of Suffield," and also that there was no *præcipe* to warrant the issuing of a *pluries* summons.

An improper description of the defendant in the writ is matter of irregularity: *Tomlin v. Preston*, 1 Chitt. Rep. 897. And the uniformity-of-process act, 2 W. 4, c. 39, has made no difference in this respect. [MAULE, J. This is a mere case of misnomer, which is no ground for setting aside the process. WILDE, C. J., referred to the 3 & 4 W. 4, c. 42, s. 11, which enacts "that no plea in abatement for a misnomer, shall be allowed in any personal action; but that, in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name. MAULE, J. In Archbold's Practice, 8th edit., by Chitty, 144, it is said that "it is only upon a misnomer appearing on the declaration, that the defendant can take any advantage of it; and, since the abolition of pleas in abatement for misnomer, the only advantage that can then be taken of it, is, that the defendant may obtain a judge's order, to compel the plaintiff to amend the mistake, and pay the defendant's cost of the *application."] *Hall v. Redington*, 5 M. & W. 605, shows that the proper mode of taking advantage of an irregularity in process, is, by motion in this form. [MAULE, J. That was not a case of misnomer. WILDE, C. J. Since the statute last referred to, there does not appear to be any authority

for a motion of this sort. "Baron" may be the defendant's Christian name; and the words "right honourable" do not necessarily import peerage.]

The affidavit on which this motion is founded, states that there is no *præcipe* filed in the proper office, for the issuing of a *pluries* summons; that the only *præcipes* found there, are, one dated the 19th of January, 1847, for an original writ of summons, and one dated the 27th of May, for an *alias* writ; and that the *pluries* writ served was tested the 27th of May. [WILDE, C. J. It is evidently a mere mistake in filling up the writ.] No writ can properly issue without a *præcipe* to warrant it. [WILDE, C. J. The *præcipe* is a mere ticket or authority for the officer to seal the writ.] In *Wadworth v. Allen*, 1 Chitt. Rep. 186, the court compelled the plaintiff's attorney to refund the costs of a bill of Middlesex, it appearing that no *præcipe* or warrant to prosecute was filed in the office.(a) [WILDE, C. J. In *Usborne v. Pannell*, 10 Bingh. 531, 4 M. & Scott, 431, it was held to be no ground for setting aside a writ of *capias*, that the *præcipe* omitted to state the amount of the debt sworn to. And in *Boyd v. Durand*, 2 Taunt. 164, there cited, Sir JAMES MANSFIELD, speaking of the *præcipe*, says, it is "a little worthless memorandum, which is no authority at all."(b) CRESSWELL, J. Does your *752] affidavit state that there was no *alias* summons?] It does not: *but, assuming that there was an *alias*, the *pluries* could not issue until the expiration of the *alias*.(c)

WILDE, C. J. The writ is not bad merely because it contains words that are more usually inserted in a *pluries* summons. There is no ground for the motion.

Per curiam,

Rule refused.

(a) The attorney being required by 4 Ann. c. 16, s. 3, to file his warrant.

(b) i.e. if sought to be treated as a proceeding in the cause; it being a matter between the officer and the person by whom he is set in motion.

(c) See 2 W. 4, c. 39, s. 10, and *R. Michaelmas*, 3 W. 4, r. 6.

WHITE and Others v. WOODWARD. June 12.

To a declaration upon a guarantee, the defendant, who was under terms to plead issuably, demurred generally, on the ground that it disclosed no consideration for the promise stated. A judge at chambers having set aside the demurrer as frivolous, the court rescinded his order,—holding, that the construction of the guarantee was open to argument, and that the demurrer was therefore not frivolous, within the rule.

ASSUMPSIT on a guarantee. The declaration stated, that, before and during the times thereafter mentioned, the plaintiffs had been, and still were, warehousemen and wholesale drapers; that, before the commencement of the suit, to wit, on the 2d of July, 1845, the defendant, by a certain promise in writing, signed by the defendant, and addressed to the plaintiffs, addressed and promised the plaintiffs, in and by the

words and figures following, that is to say—Gentlemen,—In consideration of your agreeing to supply Mr. Henry Slater, of, &c., draper and upholster, with goods, upon credit, in the way of your trade (the amount to be in your own discretion,) I hereby guaranty you the due and regular payment of such sum or sums as he may now, or at any time, and from time to time hereafter, owe to you or to the persons who for the time being may compose your firm, and against any loss you
 *may sustain by his dealings with you: and I give you full [*758
 liberty to extend the period of credit to the said Henry Slater, and to take collateral security for any moneys in which the said Henry Slater may be indebted to you, and to hold over, or renew any bills, notes, or other securities you may at any time hold, and to grant him, and the parties liable upon bills, notes, or other securities, any indulgence, and to compound, concur in assignment, or otherwise arrange with, and to release him and them respectively, as you may think fit, without thereby discharging, or in any manner affecting, my liability by virtue of this guarantee, or entitling me to set off, or claim, against the sum hereby secured, any dividend or payment you may receive from the said Henry Slater, or his estate, or any securities you may hold: my liability under this guarantee is to be limited to principal sum in running account of 100*l*.:” Averment, that the plaintiffs, confiding in the said promise of the defendant, did afterwards, and before the commencement of the suit, to wit, on the 17th of July, 1846, and on divers other days and times, supply the said Henry Slater with goods of great value, to wit, of the value of 85*l*. 10*s*. 9*d*., in the way of their said trade, upon credit in the way of their said trade as aforesaid, and for certain reasonable prices and sums of money amounting in the whole to a large sum, to wit, 85*l*. 10*s*. 9*d*.; and that, although the said credit and the time for the payment of the prices of the said goods elapsed before the commencement of this suit; and although the said Henry Slater was afterwards, and before the commencement of this suit, to wit, on the 23d of April, 1847, requested by the plaintiffs to pay them the said sum of money; yet the said Henry Slater did not pay the same, or any part thereof,—of all which premises the defendant afterwards, and before the commencement of the suit, to wit, on, &c. last *aforesaid, had notice; yet the
 defendant had not paid the said sum of money so due from the [*754
 said Henry Slater to the plaintiffs as aforesaid, being a principal sum not exceeding the said sum of 100*l*. in the said promise in writing of the defendant in such behalf mentioned as aforesaid, although the defendant was afterwards, and before the commencement of this suit, to wit, on, &c., last aforesaid, requested by the plaintiffs so to do; but the said sum still remained unpaid to the plaintiffs, &c.

To this declaration the defendant, who was under terms to plead issuably, demurred *generally*; the points marked for argument, in the margin of his demurrer, being—“that the declaration did not disclose

any consideration for the promise therein stated; and that it was not shown that the 85*l.* 10*s.* 9*d.*, was a sum which Slater did owe at the time of the commencement of the suit, on the balance of a running account."

The demurrer having been set aside by a judge at chambers, as frivolous,

Pashley, on a former day in this term, obtained a rule nisi to rescind his order.

T. Jones now showed cause. By the rule of Hilary term, 4 W. 4, r. 2, it is ordered, that, "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued, shall be stated; and, if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the court or a judge, and leave may be given to sign judgment as for want of a plea." The rule compels the party demurring, to show some substantial ground of demurrer; just as the 9th rule compels a party who sues out a writ of error, to show some particular ground of error. [MAULE, J. The penalty for a non-compliance with the last-mentioned *755] *rule is, not that the writ of error shall be set aside, but that the court or a judge may order execution to issue, notwithstanding the allowance of the writ of error.] The declaration, upon the authority of *Johnston v. Nicholls*, 1 Man., Gr. & Scott, 251, discloses ample consideration for the defendant's promise.

Pashley, in support of the rule. The only question is, whether this demurrer is so plainly and obviously frivolous and unfounded, as to deprive the defendant of the right to place his objections to the declaration upon the record. ALDERSON, B., in *Papineau v. King*, 2 Dowl. N. S. 226, says: "I think that, unless a pleading is obviously frivolous, or is pleaded in direct opposition to some decided case, we ought not to entertain these applications; because the effect of setting aside a pleading as frivolous, is, to deprive the opposite party of his writ of error." And in *Davies, dem., Lowndes, ten.*, 7 M. & G. 762, 8 Scott, N. R. 539, this court, acquiescing in the opinion of Lord LYNDBURST, that the proceeding by journeys accounts, could not, under the circumstances, be sustained, and entertaining no doubt whatever on the subject, yet declined to set it aside, because the demandant would thereby have been deprived of the opportunity of having the point raised upon the record. So far from this demurrer being frivolous and opposed to authority, it will be found to receive express sanction from the remarks made by MAULE, J., in *Chapman v. Sutton*, 2 Man. Gr. & Scott, 634. In *Raikes v. Todd*, 8 Ad. & E. 846, 1 P. & D. 138, the plaintiff declared upon a guarantee in the following form—"I undertake to secure to you the payment of any sums you have advanced, or *756] may hereafter advance, to D. on his account with you, *commencing the 1st of November, 1831, not exceeding 200*l.*;"

alleging that the plaintiff had opened an account with, and thereon made advances to, D., commencing on, &c., and that the guarantee was given in consideration of the premises, and also in consideration that the plaintiff, at the request of the party guarantying, would continue to advance further sums to D. on his said account with the plaintiff; and it was held that the consideration did not sufficiently appear by the written instrument, to support such declaration. And Lord DENMAN said: "There is certainly no necessity that the consideration should be co-extensive with the promise; but the real consideration, whatever it is, must be set out on the record. I entirely agree in the rule of construction recently laid down by TINDAL, C. J.,^(a) and my brother PATTESON;^(b) and, on reading this guarantee with reference to that rule, I must confess myself unable to say what it was that induced the defendant to guaranty payment of the past advances. I should form a conjecture that both forbearance to sue for the past debt, and the making of further advances, constituted the consideration. That, however, is conjecture only; and the declaration alleges a different consideration, viz., the further advances only. I think, therefore, the real consideration is not set out in the declaration, and the great uncertainty in which it is left entitles the defendant to have the rule made absolute." So, here, it is left altogether ambiguous and uncertain what is relied on as the consideration for the defendant's promise. [MAULE, J. The court there thought that the instrument produced did not support the averment in the declaration.] Two of the judges expressed themselves of that opinion, in addition to the other point—*that no consideration was to be collected with sufficient certainty, from [757 the declaration. *Taylor v. Brewer*, 1 M. & S. 290, shows that an arbitrary discretion to supply goods forms no consideration. [MAULE, J. The declaration in this case avers that goods were supplied to Slater, and states an entire promise—to pay for future supplies and for the past debt.] There is no case in which this alternative guarantee has been held good. The declaration discloses no consideration whatever for the promise alleged. The circumstance of the defendant's being under terms to plead issuably, although it precludes him from demurring specially to the declaration, does not prevent his relying upon any objection that is available on general demurrer. (c)

Per Curiam. Without pronouncing any opinion as to the sufficiency

(a) In *Hawes v. Armstrong*, 1 N. C. 761, 1 Scott, 661.

(b) In *James v. Williams*, 5 B. & Ad. 1109.

(c) See *Wright v. Russell*, 2 W. Bl. 923, 3 Wils. 530; *Newnham v. Dowding*, 1 Chitt. Rep. 711; *Gray v. Ashton*, 3 Burr. 1788; *Berry v. Anderson*, 7 T. R. 530; *Blick v. Dymoke*, 1 Bingh. 379, 8 J. B. Moore, 427; *Sawtell v. Gillard*, 5 D. & R. 620; *Betts v. Applegarth*, 4 Bingh. 267, 12 J. B. Moore, 501; *Barker v. Gladowe*, 5 Dowl. P. C. 134; *Children v. Mannering*, 8 Dowl. P. C. 120; *Dalton v. McIntyre*, 1 Dowl. N. S. 76; *Daniels v. Lewis*, 1 Dowl. N. S. 542; *Twight v. Prescott*, 2 Dowl. N. S. 4; *Skelton v. Halstead*, 2 Dowl. N. S. 69; *Bird v. Holman*, 2 Dowl. N. S. 234; *Gurney v. Hill*, 2 Dowl. N. S. 936; *Carlton v. Kenealy*, 1 D. & L. 331; *Flight v. Cook*, 1 D. & L. 714; *Tucker v. Barnesley*, 4 D. & L. 292; *Cutts v. Surridge*, 4 D. & L. 642.

of the declaration, it is enough to say that this demurrer is not so clearly frivolous as to warrant its being set aside. It is settled that a defendant who is under terms to plead issuably, may demur generally, though not specially. We therefore think that the rule for setting aside the order must be made absolute.

Rule absolute.

*758] *TILLEY and Another v. COLLINS. June 12.

Where, in this court, there have been no proceedings within *four terms* (or, in Q. B., within *a year*) after issue joined, a term's notice of the plaintiff's intention to proceed, must be given before he can give notice of trial: it is not enough to give a term's notice of trial.

ISSUE was joined in this cause on the 27th of December, 1845, and notice of trial given on the 20th of January following, for the adjournment day of the sittings after Hilary term. At the instance of the defendant's attorneys, the trial was postponed till the following term. Nothing further was done until the 21st of May last, when a term's notice of trial was delivered, which, however, the defendant's attorneys declined to accept, on the ground that the defendant was entitled to a term's previous notice of the plaintiffs' intention to proceed, no step having been taken for more than four terms. After a previous unsuccessful attempt at chambers,

T. Jones, on a former day in this term, obtained a rule nisi to set aside the notice of trial for irregularity.

Lush now showed cause. A term's notice of trial was sufficient, without a term's previous notice of the plaintiff's intention to proceed. In *Smith v. Paull*, 3 J. P. Smith, 101, it was held, that, after proceedings have been delayed a year, a term's notice of executing a writ of inquiry is sufficient, without giving a term's notice of the plaintiff's intention to proceed, and then a notice of executing the writ.

T. Jones, in support of his rule. The term's notice of the plaintiff's intention to proceed is quite irrespective of the notice of trial. The *759] notice of trial, being a *proceeding in the cause, cannot be given until the plaintiff has given due notice of his intention to proceed. (a) In Archbold's Practice, (b) it is said, that, "where no proceedings have been had within *four terms* exclusive after issue joined, or, as it seems, in the Queen's Bench, for *a year* after issue joined, a term's notice must be given of the plaintiff's intention to proceed in the action, before he can give notice of trial." [MAULE, J., referred to *Richards v. Harris*, 3 East, 1, observing that the notice of trial is a proceeding.]

WILDE, C. J. I do not think we are authorized to depart from a

(a) See Tidd's Practice, 9th edit., p. 756; Tidd's New Practice, 460.

(b) 7th edit. by Chitty, 210, referring to R. Mich. 4 Ann. c. Q. B., R. Mich. 1654, s. 21 and R. Easter, 13 G. 2, r. 2, C. P.

positive rule of practice, which requires a plaintiff, before he is allowed to take another step, to give a term's notice of his intention to awake a cause that he has permitted to slumber during four terms. A notice of trial is a proceeding in the cause. In the absence of any authority to the contrary, we must conclude this notice to be irregular. The rule for setting it aside will therefore be made absolute.

The rest of the court concurring,

Rule absolute.

*CRUMP *v.* DAY. June 12.

[*766

The sheriff is not entitled to call upon parties to interplead, where he has already exercised a discretion in the matter.

The sheriff, on the 20th of May, entered for the purpose of making a levy upon the goods of B, under a *fi. fa.* at the suit of A. Finding that B's person and property were protected by an order of a commissioner of bankrupts, under the 7 & 8 Vict. c. 96, the sheriff withdrew. On the 21st, C. purchased the goods from the official assignee; and, on the 3d of June, B's petition having been dismissed, the sheriff, who had been ruled to return the writ, entered a second time for the purpose of making a levy. Being then met by C's claim, the sheriff obtained a judge's order directing an issue under the interpleader act, to try whether or not the goods seized by him, were, *at the time of the second levy*, the property of C. The plaintiff thereupon obtained a rule calling upon the sheriff and C. to show cause why that order should not be set aside, on the ground that the sheriff had by his laches, in not applying on the 20th of May, precluded himself from the benefit of the interpleader act; or why the order should not be amended, by substituting the date of the *first*, for that of the *second*, levy:—

The court made the rule absolute for setting aside the order, but directed that A. should pay C.'s costs of appearing on the rule, inasmuch as the appearance of C. was necessary for the purpose of opposing an amendment, the effect of which would have been, to require him to sustain a title he had never set up.

On the 20th of May last, the sheriff of Surrey entered the house of the defendant, for the purpose of levying under a *fi. fa.* at the suit of the plaintiff, for the sum of 66*l.* 18*s.* 9*d.* The defendant producing an order of a commissioner of the court of bankruptcy, under the 7 & 8 Vict. c. 96, for the protection of his person and property from process, the sheriff withdrew. On the 3d of June, the defendant's petition being dismissed, the sheriff was ruled to return the writ; whereupon he proceeded to make a second levy. On the 4th, the sheriff received notice from Messrs. Clowes & Sons, that they claimed the property so seized, under a sale made to them, on the 21st of May, by the official assignee; and, on the following day, the sheriff took out an interpleader summons, calling upon the plaintiff and Messrs. Clowes & Sons to appear, and state the nature and particulars of their respective claims. This summons came on to be heard before V. WILLIAMS, J., on the 8th of June, [*761 when the following order was made:—

“Upon hearing the attorneys or agents for the sheriff of Surrey, and for the plaintiff, and for W. Clowes & Sons, the claimants, &c., I do order, that, upon payment of the sum of 55*l.* into court by the said claimants, within two days from this date, or upon their giving, within the same

time, security, to the satisfaction of one of the masters, for the payment of the same amount by the same claimants, according to the directions of any rule of court or judge's order to be made herein: and upon payment to the said sheriff of the possession-money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *fi. fa.* issued herein: And I do further order, that, unless such payment shall be made, or such security be given, within the time aforesaid, the said sheriff do proceed to sell the said goods and chattels, and pay the proceeds of the sale, after deducting the expenses thereof, and the possession-money from this date, into court, in the cause, to abide further order herein: And I do further order that the parties do proceed to the trial of a feigned issue, in the Court of Common Pleas, in which the said claimants shall be the plaintiffs, and the said execution-creditor shall be defendant; and that the question to be tried shall be, whether the goods seized by the said sheriff were, *at the time of the second levy*, the property of the said claimants or not: And I further order that such issue shall be prepared and delivered by the plaintiffs therein, within seven days from this date, and be returned by the defendant therein, within four days; and shall be tried at the adjournment day in London after this term: And I reserve the question of costs, and all further questions, until after the trial of the said issue."

*762] *Wordsworth*, on behalf of the execution-creditor, on a former day in this term,—upon an affidavit setting forth the above facts, and also stating that neither the commissioner nor the official assignee, had authorized any sale of the goods to Messrs. Clowes & Sons, —moved for a rule calling upon Messrs. Clowes & Sons and the sheriff to show cause why the above order should not be set aside, or why the same should not be amended, by inserting, in that part thereof which directs the question to be tried by the issue therein mentioned, the words "at the time of the first levy, to wit, the 20th day of May last," instead of the words "at the time of the second levy." [WILDE, C. J., observed that the alteration proposed was manifestly against the interest of the execution-creditor, for that, by the 7 & 8 Vict. c. 96, s. 10, it would seem that the property in the goods was out of the defendant during the interval between the filing of his petition and its dismissal.] The sheriff has, by his laches, in not retaining possession from the first, disentitled himself to seek relief under the interpleader act.

A rule nisi having been granted,

. *Charnock*, for the sheriff, now showed cause. The goods being, by the statute, vested in the official assignee from the time of filing the petition by the insolvent, the sheriff was justified in abstaining from seizing them on the 20th of May. [MAULE, J. As the property vested in the official assignee, subject to be divested in the event of the petition being dismissed, it may be a question whether the sheriff was justified in depart-

ing, so as to allow the goods to be sold to a third person. There is a difference, in this respect, between a *fi. fa.* and a *ca. sa.*] The 7 & 8 Vict. c. 95, s. 10, authorizes the official assignee to sell the property of the insolvent, if so ordered by the commissioner; and enacts, "that, *whenever any such petition shall have been dismissed, ⁷⁶³ all sales and dispositions of property, &c., by any assignee, or any person or persons acting under his authority, &c., shall be good and valid," &c. Not having *actually* seized the goods until the 3d of June, the sheriff could not apply, under the interpleader act, before that day: *Holton v. Guntrip*, 6 Dowl. P. C. 130.

Coe, who appeared for Messrs. Clowes & Sons, was informed by the court that it was unnecessary to urge any thing in opposition to the rule, inasmuch as his clients could not be called upon to take an issue prior in point of date to their purchase.

Wordsworth, in support of his rule. The officer having, in his affidavit admitted that he made a levy on the 20th of May, the sheriff was bound then to call upon the parties,—the official assignee and the execution-creditor,—to interplead. The execution-creditor ought not to be hampered by the effect of the supposed sale to Clowes & Sons on the 21st. [COLTMAN, J. Of what breach of duty has the sheriff been guilty? Would a return of *nulla bona* on the 20th of May have been a false return?] It is not necessary to show any breach of duty on the sheriff's part. He forfeits his claim to relief under the interpleader act, if he takes upon himself to exercise a discretion. [WILDE, C. J. If the sheriff make a levy, and voluntarily abandons it, he is not within the protection of the act. The difficulty I feel is, that, when the officer entered on the 20th of May, and was then met by a claim adverse to the execution-creditor, he should have come at once to the court.] The plaintiff was bound to bring the claimants before *the court. If ⁷⁶⁴ the issue is, to try the title to the goods on the 20th of May, they confessedly have none.

WILDE, C. J. Upon the best consideration I have been able to give to this case, and without coming to the conclusion that the sheriff has been guilty of any breach of duty, I still think he has, by his conduct, disentitled himself to the benefit of the interpleader act. The legislature having interfered to give that officer relief in a certain way, and in a certain way only, regard being had to the limited object of the statute, and the rules laid down by the courts in construing it, I think the sheriff, in this case, has not brought himself within its purview. To have the benefit of the course which is opened to him by the statute, it is essential that he should come promptly to the court, without exercising any discretion of his own.

Such being the law, how stand the facts of this case? On the 20th of May, the officer attempts to execute the *fi. fa.* by levying upon the effects of the defendant. There being then a claim—which was proba-

ably well founded, viz. that of the official assignee of the court of bankruptcy,—I think he could not properly have taken the goods at that time. What was then his duty? Why, to give notice of that claim to the execution-creditor, and to call upon him and the official assignee to interplead. Instead of adopting that course, the sheriff, in the exercise of his own discretion, thinks fit to retire. On the 21st of May, Messrs. Clowes & Sons purchased the goods from the official assignee; and, when the sheriff, on being ruled to return the writ, comes a second time upon the premises, he finds himself met by a claim made by third persons, but under the same title, viz. that of the official assignee. He then does what he should have done on the 20th of May. The plaintiff, the execution-creditor, very reasonably objects that he *is not put in the same position as he would have been in if the sheriff had done his duty at first. In considering this question, it is not our duty to inquire whether or not the execution-creditor has been in reality prejudiced by the sheriff's neglect. Suppose the sheriff entered upon the assumption that the assignment by the official assignee cannot be supported, I think the sheriff's failure to call upon the proper parties to interplead on the 20th of May, deprives him of all protection which the act would otherwise have given him. I therefore think the rule must be made absolute for setting aside the interpleader order.

Messrs. Clowes & Son are called upon by the rule to show cause why the order should not be amended, by substituting a day anterior to that on which their title accrued. It was perfectly correct to give them notice of the rule. If they had appeared to support the interpleader order, they would not be entitled to costs. Their counsel, however, opposed the amendment only on the ground that it was calling upon them to sustain a title which they had never set up. Certainly no such alteration as that prayed, could, with propriety, have been made, as against them. They, therefore, are entitled to their costs of appearing to oppose the motion.

Per curiam,

Rule absolute—to set aside the order of V. WILLIAMS, J., and that the plaintiff pay Messrs. Clowes & Sons their costs of, and occasioned by, the application.

766*]

*FLIGHT v. SMALE. June 12.

Where pleas are pleaded which do not correspond with the abstract delivered with the summons to plead several matters, the proper mode of taking the objection, is, by motion to strike out the pleas.

ASSUMPSIT on a bill of exchange for 99l. 1s., drawn by the defendant on the 10th of March, 1846, upon, and accepted by, one Richards,

payable twelve months after date, and endorsed by the defendant to one King, and by King to the plaintiff.

The abstract of pleas delivered upon a summons to plead several matters, described two of the pleas,—the seventh and eighth,—as follows :—

“Seventh—that the bill of exchange was drawn and accepted and endorsed for the accommodation of King, and without any consideration. Eighth—that the bill was drawn and accepted for a special purpose, *viz.* to procure the same to be discounted; that it was endorsed to King for that purpose; and that he endorsed it in violation of his promise.”

The pleas, when delivered *in extenso*, were as follows :—

Seventh—that the said bill of exchange in the declaration mentioned was drawn and made by the defendant at the request of, and for and by way of accommodation of, and for, King, and the same was also accepted by Richards at the request of, and for and by way of like accommodation of King; and that, at the time of the said drawing, making, endorsing, and accepting of the said bill of exchange, it was agreed by and between the defendant, Richards, and King, that, if the said bill of exchange should happen to be outstanding when it became due, it should be taken up and paid by King, and that no claim or demand should at any time *be made against the defendant or Richards, upon or in respect of the same—verification. [*767

Eighth—that the defendant drew the said bill in the declaration mentioned, for the accommodation of Richards, that the same might be endorsed to King, to enable him to get it discounted, and thereby receive money for the use of Richards, and without any value or consideration given by King for the drawing, endorsing, or accepting of the said bill; that the defendant endorsed the bill to King without having received any consideration, and for the purpose aforesaid; and that King received the said bill for the purpose of discounting the same, and handing over the proceeds thereof to Richards, but he, King, did not do so, nor did he pay to the defendant or Richards, any money on account of the said bill, or otherwise give the defendant or Richards any value or consideration for the same; but that, on the contrary thereof, King, having notice of the premises, endorsed the said bill to the plaintiff, in fraud of the defendant and of Richards.—Verification.

Channell, Serjt., on a former day in this term, obtained a rule nisi to strike out the seventh and eighth pleas, on the ground that they did not fairly correspond with the abstract.

Ogle now showed cause.—The motion is misconceived in point of form: according to the authority of *The South-Eastern Railway Company v. Sprot*, 11 Ad. & E. 167, 3 P. & D. 110, it should have been, to set aside the order to plead several matters, and the rule thereon, and not to strike out the pleas. [CRESSWELL, J.—The application is, not to

strike out the pleas because they are improper pleas, but because they do not substantially comply with the *abstract.] The abstract
 *768] is not to be so rigidly construed. [MAULE, J.—It must be an abstract of a plea that professes to afford a *prima facie* defence. Neither of these pleas affects the defendant with knowledge.]

Per curiam,

Rule absolute.

GRISSELL and Another v. JAMES. June 12.

Where a judge at chambers has declined to make an order, upon an application, under the 5th and 6th rules of Hilary term, 4 W. 4, to strike out counts as being in apparent violation of the former rule,—it is competent to the court to entertain the matter.

A count for goods sold and delivered was not allowed together with a count upon a special contract *apparently* for the price of the same goods, unless the plaintiff could satisfy a judge at chambers, that he *bonâ fide* intended to establish a distinct subject-matter of complaint in respect of each count; *dissentiente*, Cresswell, J., as to the application of the rule.

ASSUMPSIT. The first count of the declaration stated, that, before the making of the promise next thereafter mentioned, to wit, on the 27th of July, 1843, it was, by certain articles of agreement then in that behalf made and entered into, mutually agreed by and between the plaintiffs and defendant, amongst other things, that the plaintiffs should and would at all times thereafter during a certain term of fourteen years in the said agreement mentioned, and which had not expired, according to the orders and directions of the defendant, manufacture, construct, and deliver unto the defendant, at his premises in London only, all such machines, cranes, or improved apparatus for weighing, each calculated for weighing not less than 85lbs., and such further weight above 85lbs. as the defendant should direct to be made, in pursuance of, and according to the method described in, a certain specification in the said
 *769] *agreement referred to and described, as he the defendant should require or give orders for; and that the plaintiffs should and would charge, and the defendant should and would pay, for the same after the rate and in the manner following, that is to say, the least price or actual sum of money which the plaintiffs should necessarily have expended in and about the construction and manufacture of such machines as aforesaid, such cost price to be ascertained as in the articles and in the declaration in that behalf is mentioned, and an additional charge or sum of 15l. per cent. upon such actual cost price, to be by the plaintiffs so incurred and sustained, as a profit or remuneration to the plaintiffs, and such cost price to be calculated according to the cost price of the materials used, and of the labour employed at the time of the execution of such orders respectively. After averring mutual promises, the count proceeded to state, that afterwards, and after the making of the said agreement and promise, and before the commencement of the suit, to wit, on the 1st of August, 1843, and on divers other days and times

between that day and the commencement of the suit, and during the said term of fourteen years, he the defendant gave to them the plaintiffs certain orders and directions for, and then required, the manufacture, construction, and delivery by them the plaintiffs unto him the defendant, at his said premises in London, of, divers, to wit, 10,000 machines, 10,000 cranes, and 10,000 improved apparatus for weighing, each calculated for weighing 85lbs., to be made in pursuance of and according to the method so as aforesaid described; that afterwards, and after the making of the said agreement and promise, and before the commencement of the suit, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of the suit, and during the said term of *fourteen years, he the defendant gave to them the plaintiffs certain orders and direc- [*770
tions for, and then required, the manufacture, construction, and delivery by them the plaintiffs unto him the defendant, at his said premises in London, of, divers, to wit, 10,000 machines, 10,000 cranes, and 10,000 improved apparatus for weighing, (each respectively calculated for weighing a certain further weight above 85lbs., then being a further weight by him the defendant in that behalf directed,) to be made in pursuance of and according to the method so as aforesaid described; that they the plaintiffs did then accordingly manufacture, construct, and deliver unto him the defendant, at his said premises in London, the said respective machines, cranes, and improved apparatus for weighing, so by him the defendant ordered, directed, and required as aforesaid; and the said respective last-mentioned machines, cranes, and apparatus were then respectively made in pursuance of and according to the aforesaid method described in the said specification; that the plaintiffs did then necessarily expend and pay and lay out, as and for the cost price of, and in procuring, the materials used, and as and for the cost price of, and in payment of, the labour employed at the respective times of the execution of the said respective orders so given as aforesaid, in and about the manufacture and construction of the said machines, cranes, and apparatus, so by the plaintiffs manufactured and constructed as aforesaid, divers large sums of the moneys of the plaintiffs, amounting to a large sum of money, to wit, 10,000*l.*,—of all which premises the defendant, afterwards, and before the commencement of this suit, to wit, on the 9th of March, 1847, had notice, and he the defendant was then requested by the plaintiffs to pay them the plaintiffs for the said machines, cranes, and apparatus, so as aforesaid by them the plaintiffs manufactured, constructed, *and delivered, after the rate and in manner therein- [*771
before in that behalf mentioned and described; that a reasonable time for the defendant's so doing elapsed before the commencement of the suit; yet the defendant, disregarding his said promise, did not nor would, then, or at any other time, pay to the plaintiffs for the said machines, cranes, and apparatus, so as aforesaid by them the plaintiffs

manufactured, constructed, and delivered, after the rate and in manner in that behalf thereinbefore mentioned and described, or at any other rate, or in any other manner whatsoever; and the said machines, cranes, and apparatus, so by them the plaintiffs manufactured, constructed, and delivered as aforesaid, still remained and were wholly unpaid for; and the said cost price and actual sums of money, so by the plaintiffs expended as aforesaid, together with such additional charge or sum of 15 $\frac{1}{2}$ per cent. upon the same actual cost price, together amounting to a certain large sum of money, to wit, to 12,000 $\frac{1}{2}$ l., still remained wholly due and owing, and unpaid and unsatisfied,—of all which the defendant, during all the time aforesaid, had notice.

The second count was for work done and materials for the same provided; the third, for goods sold and delivered; the fourth, for goods bargained and sold; the fifth, for money lent; the sixth, for money paid; the seventh, for money had and received; and the eighth, for money found due upon an account stated.

An application having been made by the defendant to a judge at chambers, to strike out the first, or the second, third, and fourth counts of the declaration, on the ground that they were founded upon the same identical subject-matter of complaint, and were in apparent violation of the 5th rule of Hilary term, 4 W. 4, the judge declined to make any order.

**T. Jones*, on a former day in this term, obtained a rule nisi,
*772] to strike out either the first or the third count.

Atherton now showed cause. The question arises upon the fifth, sixth, and seventh of the rules of Hilary term, 4 W. 4, which were framed under the statute 3 & 4 W. 4, c. 42, s. 1. The 5th rule provides, that “several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognisances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect to each.” The 6th rule provides, that, “where more than one count, plea, avowry, or cognisance shall have been used, in apparent violation of the preceding rules, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognisances, are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances; in which case he shall endorse upon the summons, or state in his order, as the case may be, that he is so satisfied, and shall also specify the counts, pleas,

avowries, or cognisances mentioned in such application, which shall be allowed." And the 7th rule provides, that, "upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a *distinct subject-matter [*773 of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each plea, avowry, or cognisance which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognisance, including those of the evidence as well as those of the pleadings: And, further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognisance allowed as aforesaid upon the ground that some distinct subject-matter of complaint was *bond fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, if the court or judge before whom the trial is had shall be of opinion that no such distinct subject-matter of complaint was *bond fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognisance with respect to which the judge shall so certify."

The statutory power conferred by these rules is expressly confined to a judge sitting at chambers: *the court* has no jurisdiction in the matter; it can neither control the exercise of the judge's discretion, nor in any way interfere, where the judge certifies under the 7th rule. In *Cann v. Facey*, 4 Ad. & E. 68, 5 N. & M. 405, it was held, that, where a judge has certified to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2, in a case within *the statute, the court cannot order the plaintiff's full costs to be taxed notwithstanding the certificate, [*774 on the ground that the judge gave an erroneous reason for certifying. And PATTERSON, J., said: "I always understood, that, under the statute of Elizabeth, the court never interfered with the discretion of the judge, but would only inquire whether or not he had the power to certify at all." The machinery of the new rules cannot be applied by the court. In *Morse v. Apperley*, 6 M. & W. 145, where an application was made to the Court of Exchequer to strike out certain pleas, on the ground that they were pleaded in violation of these rules, GURNEY, B., before whom a summons had been taken out for the same purpose, having refused to make any order,—ALDERSON, B., says: "My brother GURNEY having refused to make any order, I do not see how this court can interfere. When a judge makes an erroneous order, then you may appeal to the court: but here he makes *no* order. The court has not the same power

in this respect that the judge has; for example, if parties come before me at chambers upon an application like the present, and, in answer to my inquiry whether the defendant intends to make two separate defences under the proposed pleas, he satisfies me that he *does* so intend, I make an endorsement upon the summons accordingly. The court, however, has no power to make such endorsement; which shows that there cannot be an original application to the court. In a case like the present, where the point could not be raised except an order be made, the party might apply to another judge: but, if each judge individually refuses to make an order, an appeal to them collectively in this court can surely be of no avail."

Assuming that the court *has* jurisdiction, and,—though there is no
 *775] precise decision as to the meaning of the *word,—that "*apparent violation*," means apparent on the face of the record,—the rule has not been violated here. The plaintiffs would not, necessarily, recover the same amount of damages under the first and the third counts. [MAULE, J. The plaintiffs must go for a distinct subject-matter in respect of each count. If the third involves part of what is covered by the first count, it is in violation of the rule.] In *Morse v. Apperley*, in trespass *quare clausum fregit*, the defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not possessed,—thirdly, that the defendant was seised in fee,—fourthly, that A. B. was seised in fee, and that the defendant, by his command, committed the trespass complained of, &c. Upon an application to strike out the third and fourth pleas, on the ground that they were founded on the same ground of defence as the second,—the court said: (a) "We think these pleas are not necessarily in contravention of the rule. The plea of *liberum tenementum* (b) admits the plaintiff to have the actual possession, but alleges that the right of possession is in the defendant as owner of the fee. It is consistent with that plea that the plaintiff may be in possession under a lease from the owner of the fee. It is possible that these pleas may apply to a state of facts constituting one and the same subject-matter of defence, but it is also possible that they may apply to a totally different state of facts, constituting a different defence; and, if that be so, they do not come within the rule which has been cited."

If the court should be of opinion that these two counts are in apparent violation of the 5th rule, the plaintiffs' attorney has made an affidavit, in order to entitle them to the benefit of the 6th rule. That affidavit states "that this action is brought to recover 1988*l.* 0*s.* 10*d.*, being in
 *776] part for machines and *apparatus delivered at the defendant's premises in London, under the agreement and in manner in the first count mentioned, and, in other part, for work and repairs generally and independent of the contract set forth in the first count, and, as to the residue, for machines and apparatus as mentioned in the first count,

(a) 6 M. & W. 149.

(b) The plea was *seisin in fee*.

except that the same were not delivered at the defendant's premises in London, and so were not altogether under or within the terms of the special contract in the first count mentioned; and that some distinct subject-matter of complaint is *bond fide* intended to be established in respect of each of the first and third counts."

T. Jones, in support of the rule. It is conceded, on the other side, that the party aggrieved may appeal to the court, where the judge at chambers has made an erroneous order: but it is insisted that no appeal lies where the judge *declines* to exercise his discretion. The proposition is most monstrous and inequitable, and is distinctly opposed to authority. A contrary conclusion was come to by the Court of Exchequer, upon the 13th rule of Trinity term, 1 W. 4, the language of which is very similar to that of the rule under discussion. That rule provides that "no rule to show cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognisances; but that such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognisances." In *Johnstone v. Knowles*, 1 Dowl. N. S. 80, it was held that the rule does not prevent a defendant from applying to the court, where leave to plead several matters is refused by a judge, and that the previous application need not be mentioned in the *rule: ALDERSON, B., observing,—not very consistently with the *dictum* ascribed to him in *Morse v. Apperley*,—"I think the defendant is entitled to make this application. The judge refuses an order, upon which the defendant comes to the court; and it is a good answer to the objection which might otherwise be made,—that he ought to go before a judge,—to say that he did go, but could not obtain what he wanted." [MAULE, J. There are no negative words in that rule, to take away the power conferred upon the court by the statute of 4 & 5 Ann. c. 16.] In *Cholmondeley v. Payne*, 3 N. C. 708, 4 Scott, 418, two counts upon the same contract, the one alleging the defendant to be liable jointly with another, the other, alone, were disallowed. There, the plaintiff had applied to a judge at chambers; and an appeal was made to the court, the learned judge declining to make an order. In support of the rule in that case, reliance was placed upon *Jenkins v. Treloar*, 1 M. & W. 16, 1 Tyrwh. & G. 816, 4 Dowl. P. C. 690, where the declaration contained one count claiming a fee or reward, in the name of metage, on coals imported into the port of Truro, alleged to be due to the plaintiff as lessee, under the corporation of Truro, of an ancient office of meter, to which the fee was stated to be incident, and another count claiming the same sum as a port-duty; and the court held that these counts were only different statements of the same subject-matter of complaint, within the meaning of the rule; and, in order to obviate the inconvenience suggested as to the 6th and 7th rules, the rule was made absolute, to strike out one count of the declaration, with

costs of striking it out, unless the judge at chambers, on a reference back to him, should exercise the discretion given by the rule, of allowing *both counts, on the undertaking of the plaintiff to give evidence of substantially different claims. TINDAL, C. J., thereupon said: (a) "Upon reading the first two counts of this declaration, I am unable to discover that they relate to two distinct subject-matters; and, therefore, I think we must abide by the rule, the terms of which are very express. The only way in which the plaintiff can have the benefit of the two counts, is, by referring the matter back to the judge at chambers, to make the endorsement on the summons, or give the certificate on the face of his order, under the 6th and 7th clauses of the rules of pleading referred to, according to the course adopted by the Court of Exchequer in *Jenkins v. Treloar*."

The first count in this case is clearly unnecessary. All that the plaintiff could recover under that count, he might recover under the third. [CRESSWELL, J. I am not quite satisfied of that.] The price of the machines is recoverable on the count for goods sold and delivered. The word "apparent," in the sixth rule, is evidently used in contradistinction to "actual." [MAULE, J. To constitute an actual violation of the rule, there must be an absence of intention to establish a distinct subject-matter of complaint in respect of each count, which never can appear upon the face of the declaration.] It is extremely difficult to speculate upon the real meaning of the word. One of the examples given in the 5th rule, is this—"counts for not accepting or paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed." Who is to say, upon a mere inspection of the declaration, whether these two counts relate to the same subject-matter or not? [MAULE, J. I think there can be no doubt that the violation must be apparent on looking at the counts.] *That being so, it is clear that these two counts cannot be allowed, except upon the terms of the rule adopted in *Jenkins v. Treloar*, and *Cholmondeley v. Payne*.

COLTMAN, J. It seems to me, that, in order to entitle a party to apply to a judge to strike out counts as being in apparent violation of the fifth rule, there must be reason to imagine, from an inspection of the declaration, that the plaintiff has stated the same cause of action in two different counts. The intention of the rule has always appeared to me to be, that two counts shall not be allowed, unless it be meant to give evidence of two different contracts. It is manifestly unreasonable that a plaintiff should be permitted to allege the same contract in two different ways. The affidavit that has been read, showing that there were in fact two different contracts, the plaintiff is, I think, entitled to the alternative, either to abandon one of the counts, or to be subject to the judgment of a judge at chambers, who may endorse on the summons that he

(a) In *Cholmondeley v. Payne*.

is satisfied that a distinct ground of action is intended to be established in respect of each of the counts. The case of *Cholmondeley v. Payne* shows that the court may so far review the discretion of the judge, where he has declined to make an order.

MAULE, J. By the 5th rule, several counts are not to be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each. The question is, whether the declaration in this case is in apparent violation of the rule. Amongst the examples given are the following:—"Counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.* Counts founded upon the same contract, described in one as a contract without *a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded [*780 on the same subject-matter of complaint, and are only variations in the statement of one and the same contract. So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed." These examples, I think, show that the rule was intended to be applied upon an inspection of the declaration. It never could have been intended that so inconvenient a course as an inquiry upon affidavit should take place. And this is the more evident when we come to the 6th rule, which prescribes the mode of proceeding before the judge. The word "apparent" seems to me to have been used in the sense suggested by my brother COLTMAN. The question then, is, whether the first and the third counts in this case are inserted in apparent violation of the rule, in that sense. In the first count, the plaintiffs allege that the defendants are indebted to them for a particular kind of goods manufactured under particular circumstances. There is nothing in that count which might not, I apprehend, be given in evidence under the count for goods sold and delivered. The insertion of the two counts seems to me clearly to be a more apparent violation of the rule than some of the examples given. The plaintiff could recover nothing under the first count, which he might not have recovered under the third; and that shows that the joinder of the two counts is in apparent violation of the rule. I therefore think the proper course will be, to make the rule absolute for striking out one of the counts, unless my brother CRESSWELL at chambers is *satisfied,— [*781 as possibly he will be after the affidavit that has been read,— that the plaintiffs *bond fide* intend to establish a distinct subject-matter of complaint in respect of each of the counts. And then the endorsement and certificate provided by the 6th and 7th rules may take place.

The lord chief justice desired me to say that he agrees with my bro-

ther COLTMAN and myself in thinking that the counts in question are in apparent violation of the rule.

CRESSWELL, J. I agree with the rest of the court in thinking, that, to entitle a judge to strike out one of the counts, they must be in apparent violation of the 5th rule. And I only differ from them in this, that I am unable to discover that there is in this case any apparent violation.

Rule absolute accordingly. (a)

(a) In *Gilbert v. Hales*, 2 Dowl. & Lowndes, 227, the declaration contained twenty-five counts: the first fifteen were on bills of exchange drawn at Paris; the next five, which related to the same bills, were special counts founded on the law of France; and the last five were on a special agreement to pay the bills, in consideration of the plaintiff's procuring their discount. The Court of Exchequer refused to strike out the last set of counts, as being in apparent violation of the 4th rule of Hilary term, 4 W. 4. In support of the rule, it was suggested that "the true test is, to consider whether the plaintiff could recover under the last set of counts, any damage to which he would not be entitled under the other counts." But Pollock, C. B., said: "I do not think that the true criterion in these cases is that suggested by the defendant's counsel. In the example given in the rule of court, freight on a charter-party is allowed to be joined with a count for freight *pro rata itineris*; and such two counts might fairly be joined with a third, on a special agreement to pay for the goods carried. Each of those counts would require different pleadings and different evidence to support it. So, in the present case, the three sets of counts are founded on separate and distinct rights. The first, on *the *lex mercatoria*; the second, on the law of France; and the third on the special *782] agreement." And Alderson, B., said: "These counts certainly do not, on the face of them, appear to be in violation of the rule; although it may probably turn out that there was, in point of fact, but one contract between the parties."

And see *Matthaeon v. Ray*, 16 M. & W. 329.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED IN THE

COURT OF COMMON PLEAS,

IN

Trinity Variation,

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

RICH v. BASTERFIELD. July 8.

Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants,—such liability attaches only upon parties in actual possession.

Where, therefore, an action was brought against A., the owner of premises, for a nuisance arising from smoke issuing out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage,—on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein:—*Held*, that the action would not lie.

Held, also, that, inasmuch as the premises were in the occupation of B., a tenant at the time the fires were lighted, A. was entitled to a verdict on a plea of “not possessed,” the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimney was erected.

THIS was an action upon the case, for an alleged nuisance.

The declaration stated that the plaintiff, before and at the time of the committing of the grievances thereafter mentioned, was, and from thence continually had been, and still was, lawfully possessed of a certain *messuage and dwelling-house, situate, to wit, in the county [784 of Middlesex, which messuage and dwelling-house, the plaintiff and his family, at the several times thereafter mentioned, occupied and inhabited, and dwelt in, and still did occupy, inhabit, and dwell in; that the defendant, before and at the time of committing the said grievances, was possessed of divers, to wit, two messuages, yards, gardens, and premises, near to the said messuage and dwelling-house of the plaintiff: yet that the defendant, well knowing the premises, but contriving and intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him and his family in the possession, occupation, and enjoyment of his said messuage and dwelling-house, theretofore, to wit, on the 1st of June, 1845, and on divers other days, between that day and the

21 ~~March~~ 7: 47 N. S. 23: 59² T. 160
145 Mass. 146 id. 49:

commencement of the suit, wrongfully and injuriously erected, and caused to be erected, a shop and building, and divers, to wit, two chimneys, upon the said yards and gardens of the defendant, and near to the said messuage and dwelling-house of the plaintiff; and the defendant then wrongfully and injuriously continued the said shop, building, and chimneys, so erected, for a long time, to wit, from the day and year first aforesaid until the commencement of the suit; and the defendant, on the several days aforesaid, wrongfully and injuriously lighted divers fires in the said shop and building, and caused divers large quantities of noxious, dirty, offensive, and unwholesome smoke, vapours, and stench to arise and ascend and issue from and out of the said chimneys; and that, by means of the premises, the said smoke, vapours, and stench entered into, penetrated, and spread over and through the said messuage and dwelling-house of the plaintiff, and the same messuage and dwelling-house of the plaintiff

*785] had been, during all the time aforesaid, rendered, and still were, *uncomfortable, unhealthy, and unwholesome, and unfit for habitation; and the plaintiff had, by means of the premises, been forced and obliged to, and necessarily did, keep the windows of his messuage and dwelling-house closed for long, unreasonable, and inconvenient spaces of time, to exclude the said smoke, vapours, and stench from his said messuage and dwelling-house, and was prevented from obtaining and receiving fresh air in his said messuage and dwelling-house, which he otherwise could and might have obtained and received; and the plaintiff and his family were also, by means of the premises, greatly annoyed and incommoded in the possession, use, occupation, and enjoyment of his said messuage and dwelling-house, and the furniture and chattels of the plaintiff, then being in his said messuage and dwelling-house, had been and were, by means of the premises, dirtied, spoiled, and damaged, and rendered of no use or value to the plaintiff; and the said messuage and dwelling-house of the plaintiff had been and were, by means of the premises, depreciated and lessened in value, &c.

The defendant pleaded—first, not guilty—secondly, that he, the defendant, at the said time when, &c., in the declaration mentioned, was not possessed of the said alleged two messuages, yards, gardens, and premises secondly in the said declaration mentioned, or of any of them, or of any part thereof, in manner and form as in the said declaration in that behalf alleged; concluding to the country.

Issue thereon.

The cause was tried before ERLE, J., at the sittings at Westminster after Hilary Term, 1846. The facts were as follows:—The plaintiff is an engineer residing, and carrying on his business, at No. 10, Palace Row, New Road, St. Pancras. In the year 1835, the defendant purchased two leasehold houses in Palace Row, *numbered respectively 12 and 13. The houses in Palace Row stand a considerable distance back from the public road. Each of them had formerly a

in a line with the

garden or court-yard in front; but, on several of these, shops had, from time to time, been erected, having flat roofs, to the height of the first-floor windows of the dwelling-houses in their rear. At the time the defendant became possessed of Nos. 12 and 13, there was in front of No. 12 a building of the description before mentioned; which was used as a coffee-shop, and which had in it a fireplace with a descending flue communicating with one of the chimneys of the dwelling-house. Shortly after he purchased the houses, the defendant built a shop in front of No. 13, and removed the descending flue from No. 12, and substituted a chimney, which stood a few feet above the roof of the shop. These two shops the defendant let to weekly tenants, in whose occupation they were at the time of the committing of the alleged nuisance.

The side-wall of the house No. 9, adjoining to the plaintiff's house, towards the west, projected considerably; and, when the wind set from the east or south-east, the smoke from the chimney of the shop at No. 12 had no escape, and, consequently, caused great annoyance to the plaintiff.

On the part of the defendant it was contended—first, that, inasmuch as the act of lighting the fires which caused the smoke was the act of the tenant, and not of the defendant himself, he was entitled to a verdict on the issue on not guilty—secondly, that, the premises being in the possession of the defendant's tenant, at the time of the committing of the alleged grievance, and so continuing, the defendant was also entitled to a verdict on the second issue—thirdly, that every man has a right to the use of the atmosphere for the purpose of *carrying off smoke proceeding from an ordinary chimney, with the use of the ordinary fuel. [*787

The learned judge told the jury that every man is bound so to use his property as not to injure his neighbour's rights,—with this qualification, that he may make a reasonable use of his own rights, exercising them in a reasonable place: and he left it to them to say whether or not the defendant had exercised his rights in a reasonable manner, with reference to the property in question; reserving leave to the defendant to move to enter a verdict for him upon the grounds above presented, in the event of the jury finding for the plaintiff.

The jury having found a verdict for the plaintiff, damages 40s.,

Byles, Serjt., in Easter term, 1846, accordingly obtained a rule nisi to enter a verdict for the defendant, or for a new trial on the ground of misdirection.

Talfourd, Serjt., (with whom was *Peacock*,) on a subsequent day in the same term, (a) showed cause. It is true, the defendant did not light the fires the smoke from which penetrated the plaintiff's dwelling-house; but he built the chimney, and afterwards let the shop with the chimney; and therefore, in contemplation of law, he was the author of the nui-

(a) The judges present being Tindal, C. J., and Colman, Cresswell, and Erie, J.

sance. Every man is responsible for the natural and necessary consequences of his acts: and here, the defendant must be taken to have erected the chimney for the only purpose to which it could be applied. The case of *The King v. Pedley*, 1 Ad. & E. 822, 3 N. & M. 627, goes further than it is necessary to go here, in order to sustain the plaintiff's case. It was there held, that, if the owner of land erect a building which is a nuisance, *or of which the occupation is likely to produce a nuisance, and lets the land, he is liable to an indictment for such nuisance being continued or created during the term: so, if he let a building which requires particular care to prevent the occupation from becoming a nuisance, and the nuisance occurs for want of such care on the part of the tenant. And LITTLEDALE, J., said: "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no responsibility: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it. Here the periods are short, so that there has been a re-letting; and that has taken place after the user of the buildings had created the nuisance. This is, therefore, a case in which the reversioner is liable." The case of *The King v. Moore*, 3 B. & Ad. 184, which is there cited, proceeded upon the same principle. In that case, the indictment charged the defendant with keeping certain enclosed lands near the king's highway, for the purpose of persons frequenting the same to practise rifle-shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons, armed with fire-arms, to meet in the high-ways, &c., near the said enclosed *grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near a public highway there, into a shooting-ground, where persons came to shoot with rifles at a target, and also at pigeons; and that, as the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring fields, to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. And it was held that the evidence supported the allegation that the defendant *caused* such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place-

So, here, the nuisance complained of was a probable and natural consequence of the erection of the chimney. In *Rex v. Carlile*, 6 C. & P. 636, it was held, that, if a party having a house in a street, exhibit effigies at his windows, and thereby attracts a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable offence, although the effigies exhibited are not libellous. [CRESWELL, J. In *The King v. Moore*, the defendant invited people to come to his premises for the purpose of committing the nuisance; (a) and, in *The King v. Pedley*, LITLEDAL, J., speaks of a re-letting after the user of the buildings had created the nuisance.] Here, the building of the chimney determines the character, and regulates the amount, of the nuisance. The defendant invites his tenants to commit the nuisance; and their acts will, in the course of time, give him the right so to use his premises. The only question is, *whether, the defendant having erected the chimney, the user [790 of it by his tenants, holding from week to week, is correctly described as a user *by him*. In *Roswell v. Prior*, 2 Salk. 460, 1 Ld. Raym. 718, Lilly's Entries, 81, (b) the plaintiff, having recovered damages in an action upon the case for obstructing his lights, afterwards brought a second action for the continuance of the nuisance. The case was—"Tenant for years erected a nuisance, and afterwards made an under-lease to J. S. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease." *Et per cur.* "It lies; for, he transferred it with the original wrong; and his demise affirms the continuance of it. He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. (e) Receipt of rent is upholding. (d) The action lies against either, at the plaintiff's election."

With regard to the second issue,—if the allegation in the declaration of the defendant's possession, be held to mean such a possession as would enable him to maintain trespass against a wrong-doer, undoubtedly the defendant would be entitled to a verdict on that issue. But it is submitted that that allegation is abundantly satisfied by proof that he was the owner of the reversion. Besides, that is an immaterial issue; and, if the verdict were entered thereon for the defendant, the plaintiff would still be entitled to judgment *non obstante veredicto*.

The case was presented to the jury in the most favourable way possible for the defendant. The shop itself being, by the 140th section of the metropolitan-roads *act, 7 G. 4, c. 142, declared a nuisance, [791 the defendant could have no right to erect the chimney. [CRESWELL, J. I do not see how my brother *Byles* can hope to establish the

(a) And he caused the *uninvited* to come.

(b) And see *Penraddock's case*, 5 Co. Rep. 100 b.

(c) Vide Sir W. Jones, 272.

(d) *Ryppon v. Bowles*, Cro. Jac. 373, 1 Roll. Rep. 221; *Brent v. Haddon*, Cro. J. 555.

proposition he contends for, on this part of the case. The Court of Queen's Bench has, during the present term, held, in the case of *Roe v. The Marquess of Westmeath*, 7 Law Times, 82, that a party has no right to build up a wall in such a manner as to obstruct ancient lights, or prevent the influx of wholesome air.]

Byles, Serjt., and *Wordsworth*, in support of the rule. The declaration would clearly have disclosed no good cause of action, if it had merely alleged the erection of the chimney; inasmuch as it would not, of necessity, have been used, or, if used, it might have been used with a description of fuel creating no nuisance. The gravamen here is, the emission of noxious smoke: and upon the evidence it is clear, that this is not chargeable on the defendant, for, the chimney had never been used when the present tenant's occupation of the shop commenced. The cases of *The King v. Moore* and *The King v. Pedley* are very distinguishable: in the one, the defendant was in possession of the premises at the time the nuisance complained of was created; and, in the other, he let the premises with the nuisance existing upon them. In his commentary upon the statute of Westminster 2, c. 24, (13 Edw. 1, c. 24,) Lord Coke says: "Before the making of this act, an assise of nusans did not lye against him that levyed the nusans, and against his alienee; so as, by the alienation of the wrong-doer, the assise of nusans failed: and he to whom the nusans was done, was driven to his *quod permittat* (which was a writ of right in his nature, wherein was great delay) against the alienee; and the reason thereof was, for that there *792] was no writ of assise *of nusans in the register, but that supposed that the tenant in the assise *levavit*; which is remedied by this act." 2 Inst. 405. *Rosewell v. Prior* is a mere application of the old law to the assise of nuisance given by that statute.

The defendant is clearly entitled to a verdict upon the issue on not possessed. At the time the grievance complained of was committed, he was not in possession of the premises.

Unless some prescriptive right intervenes, every man has a right to build a chimney, and to use it in the ordinary way. What easement can the plaintiff claim here? [ERLE, J. A man may have a right to the free and unobstructed access of light to his windows, or to the uninterrupted passage of a stream of water through his land; the obstruction of the one, or the interruption or diversion of the other, gives a cause of action. So, a man may have a prescriptive right to the enjoyment of pure and uncontaminated air. CRESSWELL, J. In *Aldred's case*, 9 Co. Rep. 57 a, it was resolved that an action on the case lies for erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted: so, of a limekiln, if the smoke enters the plaintiff's house, so that he cannot dwell there: so, of a dye-house, &c., if the filth runs into his fish-pond, &c.: and WRAY, C. J., said that an action on the case lies for obstructing light and air,

but not for obstructing a prospect.] The statute 7 G. 4, c. 142, was made *diverso intuitu*. The declaration is not framed upon it; nor is there any allegation that the premises were built after the passing of that act.

The court took time to consider; and, the constitution of the court having been materially changed by the decease of TINDAL, C. J., and the removal of ERLE, J., to *the Court of Queen's Bench, before any decision was pronounced, a second argument was directed, which took place in Easter term, 1847, before WILDE, C. J., and COLTMAN, CRESSWELL, and V. WILLIAMS, Js. [*793]

May 26. Talfourd, Serjt., and Peacock, for the plaintiff. The main question is, whether the defendant, having erected the chimney, and let the shop with the chimney to a tenant, who, by using it in the ordinary way, caused the nuisance complained of, can be charged as the author of the nuisance; or whether he is discharged from all liability, because he himself did not light the fires. [WILDE, C. J. The tenant may so use the chimney as to cause no nuisance; he may burn coke.] It must be assumed that the chimney was built with a view to its use in the ordinary way. If it is so used as to occasion a nuisance, the landlord has it in his power to abate the nuisance, by determining the tenancy, instead of sanctioning the continuance of it, by receiving rent week after week. *Brent v. Haddon*, Cro. Jac. 555, and *Rosewell v. Prior*, 2 Salk. 490, 1 Ld. Raym. 713, 12 Mod. 685, are distinct authorities to show that the landlord is liable for the continuance. [WILDE, C. J. Suppose a demise of the shop with the chimney, and several mesne assignments,—would all the parties through whose hands the premises had passed be liable?] The original lessor, at all events, would be. *The King v. Moore, The King v. Pedley, and Rex v. Carlile*, are strong authorities in favour of the landlord's liability. In the first of these cases, the defendant was held to be criminally responsible for the acts of strangers, because such acts were the probable result of the nuisance created by him. Upon the same principle, it was held, in *Scott v. Shepherd*, 2 W. Blac. 892, 8 Wils. 408, (a) that trespass lay against a party who threw a squib into a crowd, *which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye. [*794]

In *Gregory v. Piper*, 9 B. & C. 591, 4 M. & R. 500, it was held that a master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care; and, therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall;—it was held that the master was liable in trespass. [WILDE, C. J. *The King v. Pedley* is not quite this case: there, it appears, the houses could not be used by the tenants without becoming a nuisance. So, of the shooting-

(a) And see 3 East, 593; 3 M. & G. 520; 4 M. & G. 57.

ground in *The King v. Moore*. CRESSWELL, J. What constitutes the nuisance here?] The smoke. [CRESSWELL, J. That forms no part of the thing let.] Nor did the stench in *The King v. Pedley*. In *Rex v. Cross*, 3 Campb. 224, it was held to be an indictable offence for stage-coaches to stand plying for passengers in the public streets. Here, the building of the chimney itself was illegal.

The obvious meaning of the second issue is, whether or not the defendant was possessed of the premises at the time of the erection of the chimney, not whether he was possessed at the time of the committing of the nuisance. If he erected the chimney, it is quite immaterial whether or not he was possessed of the premises at the time the fires were lighted.

The defendant was bound so to construct his chimney, that the smoke issuing from it might be carried away by the atmosphere in such a manner as not to injure his neighbour. And he is not the less liable to an 795*] action, because some one else may be liable also. When a *man lets a house with a chimney, he impliedly authorizes the use of the chimney in the way in which chimneys are ordinarily used.

Byles, Serjt., and *Wordsworth*, for the defendant. That which is charged in this case does not in law amount to a nuisance; or, if it does, the evidence shows that it was not committed by the defendant. The right to light a fire in the ordinary way, is a necessary incident to the occupation of a dwelling. The plaintiff can, clearly, have derived no right under the prescription act, 2 & 3. W. 4, c. 71, the premises being leasehold, and no right being susceptible of acquisition under that act, that would not bind the owner of the fee: *Bright v. Walker*, 1 C. M. & R. 211, 4 Tyrwh. 502. The plaintiff stands, therefore, simply in the position of a pre-occupier. Air, like flowing water, is *publici juris*. In *Williams v. Morland*, 2 B. & C. 910, 4 D. & R. 583, it was held that an individual can only acquire a right to the latter, by appropriating so much of it as he requires for a beneficial purpose. The like doctrine is laid down in *Mason v. Hill*, 5 B. & Ad. 1, 2 N. & M. 747. Lord DENMAN, in this latter case, refers, amongst other authorities, to the Roman law, which says (a): "*Et quidem, naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et, per hoc, littora maris.*" Assuming, however, that this is a nuisance, the evidence failed to establish that the defendant was the author of it. It is said, that, the defendant having erected the chimney, the lighting of fires therein was the natural and necessary consequence of this act, and, therefore, that he is responsible. [WILDE, C. J.—That he, by his act, authorized the act which created the nuisance.] If the declaration had stopped at the 796*] allegation of the building of the chimney, it would have *been bad, in arrest of judgment; the erection of the chimney being, in itself, a perfectly lawful act. In *Milne v. Smith*, 2 Dow. 390, where a plasterer, employed about a new building, of which the floors were not

(a) 2 Just. Inst. tit. 1, s. 1.

laid, or where an opening was left for the staircase which was not then begun, for the convenience of his operations, opened, or caused or advised to be opened, a passage or communication from the common staircase of an adjoining house, and afterwards went away for a time, before his work was finished, with the intention of returning at a future period to complete it, and, both while he was there, and during the time he was absent, other workmen employed about the premises—masons, carpenters, and others—made use of the passage or communication, and, during the time the plasterer was so absent, the passage not having been secured at night, a man fell through, and was seriously injured;—it was held by the House of Lords, (reversing a decision of the Court of Sessions,) that the plasterer was not the person liable in damages for this misfortune. That case is precisely in point. To make *The King v. Moore* applicable to the present case, the indictment should have been preferred against the landlord, instead of the occupier; and, in *The King v. Pedley*, the defendant was personally guilty of an act of omission. [WILDE, C. J. In *The King v. Pedley* there was a positive *existing* nuisance on the premises at the time of letting, and not, as here, a thing from which a nuisance *might* possibly emanate at some future time.] Precisely so. The defendant has not actually, or constructively, been guilty of the nuisance charged.

The second is clearly a good plea, and ought, upon the evidence, to have been found for the defendant. [WILDE, C. J., referred to *Bush v. Steinman*, 1 B. & P. 404, and asked whether that case had not been recently considered. *Byles*, Serjt., referred to *Quarman v. *Burnett*, 6 M. & W. 499, and *Burgess v. Gray*, 1 Manning, Gr. [*797 & Scott, 578; and *Channell*, Serjt., *amicus curiæ*, mentioned *Allen v. Hayward*, 7 Q. B. 960, 15 Law Journ., N. S., Q. B. 99.] *Cur. adv. vult.*

CRESSWELL, J., now delivered the judgment of the court.

This was an action on the case, in which the declaration alleged that the plaintiff had been and was possessed of a messuage, &c., which he and his family occupied; that the defendant was possessed of two messuages and yards near to the plaintiff's messuage; and that the defendant, contriving to injure the plaintiff and his family in their occupation, &c., on, &c., erected certain shops and chimneys on the defendant's said yards, near to the plaintiff's house, and continued the same there, and lighted fires in the said shop, and caused smoke, &c., to issue from the said chimneys; whereby the plaintiff's messuage was rendered unhealthy, and he was compelled to keep his windows closed, to exclude the smoke, and was prevented obtaining fresh air, and the plaintiff and his family were annoyed and prejudiced in the occupation of his messuage, &c. The defendant pleaded—first, not guilty—secondly, that he, the defendant, was not possessed of the said yards and shops.(a)

(a) *Quære*, whether the plaintiff would not have been entitled to judgment *non obstante veredicto*, if the defendant had obtained a verdict on this plea only. *Vide supra* 784.

At the trial before my brother *Erle*, at the sittings in Middlesex after Hilary term, 1846, it appeared in evidence that the plaintiff was possessed of a house, No. 10, and the defendant of two other houses, being Nos. 12 and 18, in the New Road, east of Tottenham Court Road; that the houses stand a considerable distance back from the road; that, in front of the defendant's houses, the defendant some time since erected two low buildings, which were let as shops; that he *afterwards
*798] put a stove into one of the shops, from which the smoke was at first carried under ground into one of the chimneys of the house behind it; but, that plan not answering, that he afterwards erected a chimney; and that the shop, with the stove and chimney, was subsequently let to a tenant from week to week, who occupied it at the time when the nuisance to the plaintiff's house was said to have been committed, and by whom the fires complained of were made.

A former occupier stated that he used to make fires in the stove, principally of coke, and that no smoke which could be at all injurious then issued from the chimney. The fires made by the present occupier caused a good deal of smoke to issue, which, when the wind blew towards the plaintiff's house, was driven to it, and compelled him to keep his windows shut.

Upon this evidence, it was contended, for the defendant, that he was entitled to a verdict on both issues; for, that the act of his tenant in making fires, could not be considered as his act, and therefore he was not guilty; and that, the tenant being in possession at the time when the nuisance was said to have been committed, the defendant was entitled to a verdict on the issue of not possessed, also,

The learned judge reserved to the defendant leave to move to enter a verdict in his favour, and left to the jury the question whether the defendant made a reasonable use of his rights in respect of the property in question in a reasonable place; and they found for the plaintiff.

In Easter term, 1846, a rule nisi for entering a verdict for the defendant was granted, which was argued in Trinity term, and afterwards stood over for consideration: and, as a considerable change had taken place on the bench before any decision had been come to, it was thought
*799] right that the case should be argued *a second time, before the court as at present constituted.

The arguments against the rule were founded principally on *The King v. Moore*, 8 B. & Ad. 184, and *The King v. Pedley*, 1 Ad. & E. 822, 3 N. & M. 627. In the former of these cases, the defendant was indicted, in the first and second counts, for keeping certain enclosed lands and grounds near to the king's highway, and to private dwelling-houses, for the purpose of persons frequenting such grounds to practise rifle-shooting, and to shoot at pigeons with guns, and that he did unlawfully cause divers persons to meet and frequent there for that purpose, and did unlawfully permit and suffer, and cause and occasion, a great

number of idle and disorderly persons, armed with guns and fire-arms, to meet and assemble in the streets and highways, and other places near and about the said enclosed premises of him the defendant, discharging fire-arms, and making a great noise, disturbance, and riot; by means whereof, the king's subjects were disturbed, &c. &c. There were other counts. The evidence was, that the defendant occupied land, of which he enclosed part, and used it as a shooting-ground, where people came to fire at a target with rifles, and to shoot pigeons; that a number of persons constantly assembled near the shooting-ground, with guns, for the purpose of shooting the pigeons that escaped; and that the defendant endeavoured to keep them off that part of the land, outside the shooting-ground, which belonged to himself. It was contended that the defendant was not responsible for the acts of those who assembled at the outside of his grounds. But Lord TENTERDEN ruled otherwise; and the defendant was found guilty on all the counts: and the court refused to disturb the verdict; from which it was argued, in this case, that the landlord, having built *a chimney and put a stove in the shop, [*800 in order that the occupier might make a fire there, was responsible for the consequences. But the case mainly relied on, was, *The King v. Pedley*, in which it was said to have been decided, that, if a landlord erects a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and lets the land with the building so erected, he is liable to be indicted for such nuisance being continued or created during the term. *Rosewell v. Prior*, 2 Salk. 460, 1 Ld. Raym. 713, was also cited to prove that a tenant for term of years, having erected a building that was a nuisance to his neighbours, and afterwards sublet his premises with the nuisance upon them, was liable to be sued for the continuance of the nuisance,—which it was contended was an authority for saying in this case, that the defendant, having erected the chimney, and let the shop with the chimney, was liable for the injury done by the smoke issuing from it.

On the other hand, it was contended, that, inasmuch as the fires, which created the smoke complained of, were made, not by the defendant or his servants, but by his tenants, he was not responsible; and that, although in some cases, *ex. gr. Bush v. Steinman*, 1 B. & P. 404; *Burgess v. Gray*, 1 Man. Gr. & Scott, 578, and *Randleston v. Murray*, 8 Ad. & E. 109, the owners of property were held liable for injuries arising from acts done upon that property by persons not strictly their agents or servants; yet such liability attached only upon persons in possession; and that the defendant in this case, not being in possession at the time when the nuisance complained of was created, could not be made liable. And such is now the opinion of the court.

It was not contended, either at nisi prius, or on the argument, that the chimney erected by the defendant *was itself a nuisance; and, unless used in a manner which caused smoke to issue, so as to [*801

prejudice the plaintiff in the occupation of his own premises, no complaint could have been made against it. The landlord, therefore, did not let the premises with any existing nuisance upon them: if he had, by letting and receiving rent for them in that condition, he would have been liable for continuing and upholding the nuisance, as in *Rosewell v. Prior*. Nor had he entered into any contract, express or implied, with the tenant, to make fires of any kind. The latter might have wholly abstained from making fires, without being subjected to any complaint by the landlord; or he might have made fires so that no inconvenience to the plaintiff would have ensued, by using coke,—which was the course adopted by the former occupier, Shearman; or he might have abstained from making fires at all, when the wind was in such a direction as to carry the smoke to the plaintiff's house.

It being, therefore, quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance,—it seems impossible to say that the tenant was, in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant, is, that he enabled the tenant to make fires, if he pleased.

The case, then, resting, not upon the erection of the chimney, but upon the subsequent use of it by the tenant, can the defendant, his landlord, be held to be guilty of the nuisance?

Several cases have occurred in which the owners of fixed property have been held liable for the consequences of acts done upon it by persons not strictly *their servants or agents.^(a) But the principle on which those cases proceeded, and the limits within which they should be restrained, are clearly laid down by LITLEDAL, J., in *Laugher v. Pointer*, 5 B. & C. 547, 8 D. & R. 556; which judgment is cited with much just approbation, and adopted by the Court of Exchequer, in *Quarman v. Burnett*, 6 M. & W. 499. The principle stated by Mr. Justice LITLEDAL is, that, where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors or their servants. This rule explains all the cases except *Leslie v. Pounds*, 4 Taunt. 649, and *The King v. Pedley*. In the former, the landlord of a house under repair was sued for an injury done to a person by reason of negligence in leaving a cellar-flap open. The house was let to a tenant, who had gone out of it in order that the repairs might be done; and the landlord took upon himself to order the repairs, and superintend them, although they were to be paid for by the tenant. The landlord was held liable. But Sir JAMES MANSFIELD, C. J., observed that it was

(a) And see *Beaulieu v. Finglam*, 1 Man. Gr. & Scott, 586, n.

a very singular case; and his judgment proceeded entirely on the ground, that, under the circumstances, the landlord was the principal, and, as a principal, answerable for the acts of the persons he employed. *Leslie v. Pounds*, therefore, is not an authority for the decision of the present case. *The King v. Pedley* more nearly resembles it. That was an indictment which charged the defendant with erecting near certain public streets and dwelling-houses, two buildings called necessary-houses, for the common use of divers persons residing in and *frequenting [803 Diamond Alley, and did also make and cause to be made a certain open sink for the reception of ordure, &c., and, on divers days, &c., divers persons had resorted to and used, and still did resort to and use, the said necessary-houses, and did place and leave in the said sink large quantities of ordure,—by reason of which, &c., (stating the nuisance resulting.) On the trial, before Lord DENMAN, at Bedford, it was proved that the defendant was in the receipt of the rents of twelve dwelling-houses, which were let for short periods to tenants, and that two necessary-houses and a sink belonging to them were used in common by the persons occupying the dwelling-houses. It did not appear whether any of the present tenants commenced occupying the dwelling-houses before the defendant began to receive the rents; but the necessary-houses and sink were constructed, and used by the tenants of those premises, before his time. There was no distinct proof of any actual demise of the necessary-houses, and sink; but they had regularly been cleansed by the persons occupying the dwelling-houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. Some evidence was given to show an implied admission by the defendant, that he himself was bound to do the cleansing. The jury, under Lord DENMAN's direction, found the defendant guilty, subject to a motion to enter a verdict of acquittal. A rule nisi for that purpose was afterwards granted, but was, after argument, discharged. In that case, as in the present, the building itself was not a nuisance; it was the user of it that created the nuisance: it is, therefore, important to inquire upon what grounds the judgment proceeded. If, indeed, it was to be taken, that, in the absence of any distinct proof of a letting of the buildings complained of, the possession remained in the landlord, no *doubt he would be responsible for the acts which he [804 permitted to be done upon them. Or, if he had undertaken to cleanse, and did not, the nuisance that resulted might be attributed to him. The judgment of Lord DENMAN does not appear to have proceeded on either of those grounds, but upon the authority of *The King v. Moore*, because the nuisance was the natural consequence of the nature of the erection,—and of *Rosewell v. Prior*, because the landlord, by taking rent, must be considered as upholding and continuing the nuisance. LITTLEDALE, J., seems to have rested his judgment on the principle, that the landlord was not to let the land with the nuisance upon

it; and he proceeds: "Here, the periods are short, so that there has been a reletting; and that has taken place after the user of the buildings had created the nuisance." He therefore assumes that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To his judgment, proceeding on that ground, we entirely assent; and probably Lord DENMAN meant the same thing, when he said that the receipt of rent was upholding *and continuing* the nuisance. TAUNTON, J., after adverting to the doubt as to the premises being demised, or remaining in the defendant's possession,—in which case he would certainly have been liable,—proceeds to say, that the landlord was bound to exact from his tenants an obligation to cleanse, with a right of entry in their default; and that he was at all events liable. To this we cannot subscribe, notwithstanding the unfeigned respect which we feel to be due to any opinion expressed by that very learned judge; for, it appears to us, that, if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not; the landlord cannot be made responsible

*805] for the acts of the tenant: and *a fortiori* he would not be liable, if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance, if created. The judgment of WILLIAMS, J., appears to proceed on the ground that the landlord had it in his own power to remove the nuisance; for, he refers to the admission said to have been made by him, that he was bound to do the cleansing.

If, then, *The King v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised,—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.

For the reasons already given, we think that the verdict must be entered for the defendant on the plea of not guilty, as well as on the issue of not possessed, which refers to the time when the nuisance was created.

Rule accordingly.(a)

(a) And see *Dawby v. Berch*, M. 4 E. 3, fo. 36, S. C. Lib. Ass. Anno 4, fo. 6, pl. 3, S. C. resumed. M. 5 E. 3, fo. 43, pl. 36, as to the liability of a party for a nuisance occasioned by a lime-kiln, (*toraille pour arder chaux*.) In that case the plaintiff took issue upon a special traverse in the plea, denying that the defendant's ancestor erected the lime-kiln, to the damage of the plaintiff's freehold messuage; the defendant ineffectually contending that the plaintiff ought to have taken issue upon an allegation in the inducement to the traverse,—that the defendant's father was seized of the lime-kiln before the plaintiff was seized of the messuage.

***DAVID STEAD v. GEORGE ANDERSON, One of the** [*806
Directors for the Time being of THE METROPOLITAN
PATENT WOOD-PAVING COMPANY. July 8.

In case for infringement of a patent, the defendant pleaded not guilty,—that the plaintiff was not the true and first inventor,—and that the invention had been previously wholly or in part publicly and generally known, used, practised, and published in England:—

Held, that the issue on the first plea must be determined by the acts done by the defendant, without reference to the existence or the non-existence of a fraudulent intention;—that the second plea would be proved by showing a publication before the date of the letters-patent;—and that the third plea only raised a question of user before the grant of the letters-patent.

THIS was an action upon the case for an alleged infringement, by the defendant, of the plaintiff's patent right.

The declaration stated, that the plaintiff, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendant, as thereafter mentioned, was the true and first inventor of the working or making of a certain manner of new manufacture within this realm, to wit, a certain invention for making or paving public streets, and highways, and public and private roads, courts, and bridges, with timber or wooden blocks, and which said invention others, at the time of the making of the letters-patent first thereafter mentioned, did not use; that thereupon, our lady the now queen, by her letters-patent under the great seal of the united kingdom of Great Britain and Ireland, bearing date at Westminster, the 19th of May, 1838, for herself, her heirs and successors, did give and grant unto the plaintiff, his executors, administrators, and assigns, her said majesty's special license, full power, sole privilege, and authority, that he, the plaintiff, his executors, &c., and every of them, by himself or themselves, or by his or their deputy or deputies, servants or agents, or such others *as he the plaintiff, his executors, &c., should, at any time, agree [*807 with, and no others, from time to time, and at all times thereafter, during the term of years in the said letters-patent expressed, to wit, the term of fourteen years from the date thereof, should and lawfully might make, use, exercise, and vend the said invention within that part of her said majesty's united kingdom of Great Britain and Ireland called England, her dominion of Wales, and the town of Berwick-upon-Tweed, and also in her said majesty's colonies and plantations abroad, in such manner as to the plaintiff, his executors, &c., or any of them, should, in his or their discretion, seem meet, and that he, the plaintiff, his executors, &c., should, and lawfully might, have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years in the said letters-patent expressed, &c. &c.; that it was by the said letters-patent, amongst other things, provided, that, if the plaintiff should not particularly describe and ascertain the

nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in her majesty's high Court of Chancery, within *four* calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever by the said letters-patent granted, should utterly cease and determine and become void, any thing thereinbefore contained to the contrary in any wise notwithstanding,—as by the record of the said letters-patent remaining in her said majesty's high Court of Chancery, reference being thereunto had, would, amongst other things, more fully and at large appear; that the said letters-patent so granted to the

*808] plaintiff as aforesaid, were and are the same letters-*patent first

recited and mentioned in the act of parliament passed in a session of parliament holden in the 4th and 5th years of the reign of Queen Victoria,—being, an act for forming and establishing Stead's Patent Wood-Paving Company, and to enable the said company to purchase certain letters-patent, and for confirming the same; (a) that he, the plaintiff, did, as mentioned in the said act of parliament, within six calendar months next and immediately after the date of the said letters-patent, to wit, on the 19th of November, 1838, cause to be enrolled in her said majesty's high Court of Chancery, an instrument in writing under his hand and seal, whereby he did then particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed; that he, the plaintiff, had always, from the time of the making of the said letters-patent as aforesaid, by himself, his deputies, servants, and agents in that behalf, made, used, exercised, and vended the said invention, to his great advantage and benefit; yet that the said Metropolitan Patent Wood-Paving Company, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent to the plaintiff, and the passing of the said last-mentioned act of parliament, and within the said term of fourteen years by the said letters-patent granted, to wit, on divers days and times between the 1st of May, 1844, and the 30th of June, 1844, and within that part of the united kingdom of Great Britain and Ireland called England, that is to say, at a certain place called the Bricklayers'

*809] Arms *Terminus of The Dover Railway station, in the county

of Surrey, unlawfully and unjustly, and without the leave, license, consent, and agreement of the plaintiff, in writing, under his hand and seal, or otherwise, for that purpose had and obtained, and against the will of the plaintiff, *did make, use, and put in practice the said invention* of the plaintiff, in breach of the said letters-patent, and

against the privileges so thereby granted to the plaintiff as aforesaid; and also, on the several and respective days and times last aforesaid, within that part of the united kingdom of Great Britain and Ireland, called England, and at the place aforesaid, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff, in writing, under his hand and seal, for that purpose first had and obtained, and against the will of the plaintiff, *did counterfeit, imitate, and resemble the said invention* of the plaintiff, in breach of the said letters-patent, and against the privileges so thereby granted to the plaintiff as aforesaid; and also, on the several days and times aforesaid, and within that part of the united kingdom of Great Britain and Ireland called England, at the place aforesaid, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff, in writing, under his hand and seal, or otherwise, for that purpose first had and obtained, *did make and cause to be made divers additions to the said invention, and subtractions from the same, whereby they did pretend themselves to be the inventors and devisers of the said invention*, in breach of the said letters-patent, and against the privileges so thereby granted to the plaintiff as aforesaid; and that, by means of the committing of the said several grievances by the said Metropolitan Patent Wood-Paving Company as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the *said invention and letters-patent, and in respect whereof he was entitled to such privileges as aforesaid, &c. [810

The defendant pleaded—first, not guilty.

Secondly, that the plaintiff was not the true and first inventor of the said invention in the said letters-patent and specification in the declaration mentioned, in manner and form as the plaintiff had therein above alleged; concluding to the country.

Thirdly, that the said invention in the said letters-patent and specification in the declaration mentioned, was not, at the time of the making and granting the said letters-patent, nor had the same at any time afterwards been, of any use, benefit, or advantage to the public whatever; that, by reason thereof, the rights, liberties, privileges, benefits, monopolies, and advantages by the said letters-patent granted, and the prohibitions therein contained, were, at the time of the making and granting the said letters-patent, and thenceforward had continued to be, and at the said several times when, &c., in the declaration mentioned were, and still remained, wholly void and of no effect, and the same were wholly lost and forfeited to and by the plaintiff; wherefore the said Metropolitan Patent Wood-Paving Company, at the said several times when, &c., in the declaration mentioned, committed the said several grievances in the declaration mentioned, as they lawfully might, for the cause aforesaid—verification.

Fourthly, that the plaintiff did not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, in manner and form as the plaintiff had, in his said declaration, alleged—concluding to the country.

Fifthly, that theretofore, and long before the making and granting of the letters-patent in the declaration mentioned, to wit, on the 1st of January, 1800, and on divers others days and times thenceforward continually *until the day of the date and grant of the said letters-patent in the declaration mentioned, and thenceforward, the said supposed invention in the declaration mentioned had been and was, wholly and in part, publicly and generally known, used, practised, and published within that part of the united kingdom of Great Britain and Ireland, called England; whereby, and by reason whereof, the rights, liberties, privileges, benefits, monopolies, and advantages in and by the said letters-patent granted, and the prohibitions therein contained, were, at the time of the making and granting the said letters-patent, and thence hitherto had continued to be, and at the said several times when, &c., were, and still remained, wholly void and of no effect, and the same were wholly lost and forfeited to and by the plaintiff; wherefore the said Metropolitan Patent Wood-Paving Company, at the said several times when, &c., in the declaration mentioned, committed the said several supposed grievances in the declaration mentioned, as they lawfully might, for the cause aforesaid—verification.

Sixthly, that the title, statement, and description of the said supposed invention in the declaration mentioned, and in the said letters-patent therein referred to and mentioned, to wit, “an invention for making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks,” was and is, in its claim, description, and definition of the said supposed invention, too large, uncertain, inapplicable, inexplicable, inconsistent, vague, and ambiguous, and at variance with the limited object, purpose, and use of the said supposed invention, as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff, and enrolled in her said majesty’s high court of Chancery, as in the said declaration alleged; whereby the said *letters-patent became and were wholly void and of no operation, force, or meaning—verification.

Seventhly, that the said supposed invention in the declaration mentioned, was not nor is an improved mode or method of making or paving streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks—verification.

The plaintiff joined issue on the first, second, and fourth pleas; and replied to the third, that the said invention in the letters-patent and specification in the declaration mentioned, was, at the time of the making and granting of the said letters-patent, of use, benefit, and advantage.

to the public,—to the fifth, that before the making and granting of the letters-patent in the declaration mentioned, the said invention in the declaration mentioned was not, wholly or in part, publicly or generally known, used, practised, or published, within that part of the united kingdom of Great Britain and Ireland called England, in manner and form as the defendant had in his said fifth plea alleged,—to the sixth, that the title, statement, and description of the said invention in the declaration mentioned, and in the said letters-patent therein referred to mentioned, was not nor is, in its claim, description, or definition of the said invention, too large, uncertain, inapplicable, inexplicable, inconsistent, vague, or ambiguous, or at variance with the limited object, purpose, and use of the said invention, as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff, and enrolled in her majesty's high Court of Chancery, in manner and form as the defendant had in his said sixth plea alleged,—and, to the seventh, that the invention in the declaration mentioned *was* an improved mode and method of making or paving streets and highways, and public and private roads, courts and bridges, with timber or wooden blocks, in manner *and form as in the declaration was alleged. Issue [*813 thereon.

The cause was tried before PARKE, B., at the summer assizes for the county of Surrey, in 1846.

The plaintiff's specification, which was put in and read, was as follows :—

“Specification under letters-patent, dated 19th of May, 1838, to David Stead, of Great Winchester Street, in the city of London, merchant, of an invention of ‘making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks :’—

“Now, know ye, that, in compliance with the said proviso, I, the said David Stead, do hereby declare the nature of the said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figures and letters marked thereon ; that is to say, *the invention consists of a mode of paving by means of wooden blocks cut or formed of similar sizes or dimensions.* And in order to give the best information in my power, I will proceed to describe the drawing annexed, which represents part of a road, or other similar surface, laid down with blocks of wood of a hexagonal figure, which figure at once offers the advantage of going together, and also that the lines of junction proceed in varied directions, by which the blocks of wood will sustain each other more securely than if formed of any other figure. *I do not, however, confine my claim to hexagonal blocks, as triangular, or square blocks, placed diagonally, may be used with advantage.* And, in order further to secure the blocks from sink-

ing or getting displaced, I employ dowels or pins to each block, as is shown in the drawing, though I do not consider this requisite in all cases.

*814] The blocks *of wood are to be placed on the earth, or formed, *with the grain of the wood in a vertical position*; and, in applying such blocks as a paving, the surface of the road or other such way is to be prepared in as solid a condition as possible, and to the figure or intended slopes; and the blocks are successively to be applied, having sand or other fine filling, driving each block up to those against which it is to rest, having first introduced the dowels or pins, which I prefer to be of oak. And it should be stated that the wood I make use of should be of a hard and solid texture, such as oak, pine, beech, &c., and that the size of the blocks I prefer, for public roads and streets, about seven to ten inches diameter at top, *slightly diminishing to the base*, and about nine to twelve inches in height. And I prefer that the wood employed should be first boiled in tar, or saturated by other suitable material acting as a preservative to the wood; and it will be found advantageous to fill up the interstices between the blocks of wood with melted pitch, or pitch and sand or earth combined, though this is not essential; and I make no claim for such using of pitch and sand or earth."

It was then proved, that shortly after the grant of the letters-patent, the plaintiff commenced laying down, in various parts of the metropolis, pavement in the manner described in his specification,—the first being laid down at the east end of Oxford street, and consisting of sexagonal blocks, with all the sides parallel to each other, about ten inches in depth, placed *with the grain or fibre in a vertical position*, thus on a hard bed of shingle, with a little fine sand strewed over the surface, to fill up the interstices occasioned by unavoidable irregularities and imperfections in the blocks.



It was further proved that the defendant, who represented a company *815] called The Metropolitan Patent *Wood-Paving Company,(a) had adopted a somewhat similar mode of paving, but with blocks of wood of a rhomboidal form, of equal dimensions, closely fitting together, and sustaining each other, *the grain of the wood not being vertical*, but parallel with the sides, at an angle of about sixty-three degrees, and presenting on the surface a uniform succession of squares; the upper part of each block resting upon a portion of the base of the adjoining one, thus.



In order to meet, by anticipation, the defence that had been set up in a former action for an alleged infringement of the same patent,(b) the plaintiff called Sir William Worsley, of Hovingham Hall, near Whitwell, in Yorkshire, Professor Farey, Mr. Galloway, an engineer, and Colonel Jackson, a colonel of engineers in the Russian service, and other witnesses.

(a) Having certain powers under the 5 & 6 Vict. cap. lxxxv.

(b) *Stead v. Williams*, 7 M. & G. 818, 8 Scott, N. R. 449.

Sir William Worsley stated, that, in the year 1838, he had caused a vestibule, or covered carriage way, about thirty feet in length, and ten feet in width, leading to the principal door of the Hall, to be paved with hexagonal blocks of wood about ten inches in depth,—borrowing the idea from the form of the honeycomb; that *these blocks, which tapered considerably towards the base, were driven into a foundation of sand*, with the ordinary paving rammer; and that the way in question was *strictly private*, being accessible only to persons visiting at the Hall.

Professor Farey stated, that, in his opinion, the mode of paving described in the plaintiff's specification differed materially from that suggested in the communication addressed by Mr. Finlayson to the editor of The London Journal of Arts, and published in the 51st *number of that work, in the year 1825,(a)—Finlayson's plan being [816

(a) The material parts of Finlayson's letter were as follows:—

"The subject of roads and road-making having of late occupied a considerable portion of public attention, perhaps you will permit me, through the medium of your useful journal, to suggest a novel method of laying down a roadway, suited to the streets of London and other great towns. The principal material of which I propose to make my road, is wood: but, let not the idea be hastily discarded, because so perishable a material is to be employed, until my views in so doing, and plan of applying it, are fully understood. Many years back, I laid down a piece of road of the kind I am about to describe, which has ever since been in use, and remains in good order. I very recently took up a portion of the road, for the sake of observing it, when the wood of which it was constructed appeared to be as sound and likely to endure as on the day when the road was first laid down. My engagements having been in the agricultural line, and in the northern parts of this island, I have not had that opportunity of exhibiting my plans in operation in the metropolis; which I now intend to do at an early period.

"The method of making roads, adopted by Mr. M'Adam, is unquestionably excellent in its way, and well calculated for open situations: but, in the narrow streets of London and other large towns, where the traffic is incessant, and all descriptions of carriages are constantly rolling over the road in nearly the same tracks, the wear and tear is excessive, and far beyond any thing generally contemplated; consequently, the mud in winter, and dust in summer, will be a nuisance too great to be long endured by the inhabitants.

"Conceiving, then, that the public will very soon be convinced that nothing but a stable material will answer for the roadways in the metropolis, I shall dismiss the consideration of M'Adam's plan, and, without further preface, describe the mode by which I propose to remedy existing evils, and to form a road that shall be stable, durable, clean, and prevent that astounding noise which is so extremely annoying, not only to strangers, but to the inhabitants themselves.

"In Plate VIII., figure 6, a plan, or horizontal view, is given of a portion of paving for a public street of the kind which I am suggesting. Figure 7, is a vertical section of the same, taken cross-ways: *aaaa*, is an oblong box made of cast-iron, with cross-partitions, leaving eighteen square sockets, into each of which a wooden block, the grain upwards, is to be inserted, for the purpose of occupying the place of the ordinary paving stones. These blocks may be of any kind of wood that would answer for that purpose; though I should prefer larch fir, as that is less likely to decay than most other woods, and is more tough and difficult to be split or torn asunder, and, when kept damp, as it naturally would be while in the earth, would last for ages. The dimensions of these wooden blocks might be *about eight inches square* on their top surface, and about eighteen inches high: their form, as seen in the section, figure 7, should be *slightly tapering, from a little below the middle, downwards*, for the purpose of fitting solidly into the recesses of the iron box, and also *slightly tapering upwards from the same part*, as shown in the section, for the purpose of allowing gravel or broken stones to be introduced between the wooden blocks when fixed, in order to wedge and confine the blocks firmly, and prevent them from being shook or displaced by the carriages, as they pass over.

"The iron boxes may be about four feet and a half by two feet and a half, on their superficies, and about eight inches deep, or any other dimensions that circumstances may render

- *817] inefficient in itself, and impracticable by *reason of its expensiveness; that the plan suggested in the letters addressed by Mr. Heard to the secretary of The Society of Arts, in 1838, and published in p. 168, of the 49th volume of the transactions of that learned
- *818] body, (a) also differed essentially from the plaintiff's *invention, as well in the manner of fashioning the blocks as in the prepara-

convenient. The bed or foundation of the road being prepared by rolling, ramming, or otherwise, so as to be perfectly solid, and as level as possible, as many of these boxes are to be laid down as will cover the road, and which are to be made as secure as may be on the sides, to prevent them from being pushed from their situation. Into the recesses of the iron boxes, the blocks of wood, previously prepared, and all of one length, are to be introduced, the lengthways of the grain, in a perpendicular direction. When they are thus placed, their surfaces being all level, gravel, broken stones, or hard rubbish are to be rammed in between the wooden blocks, and the road will be formed, ready for immediate use, in such a firm manner that neither time nor the heaviest weights which may pass over it will in any degree alter its level, or destroy the materials of which it is composed."

(a) Extracts from Heard's first letter, dated the 6th of October, 1832:—

"I take the liberty of soliciting that you will lay before The Society of Arts, &c., the following account of a mode of constructing roads in cities, hitherto totally unknown in England, and by far the most perfect that has come under my notice. I think no person will deny that it is desirable to have the streets of towns so paved, that in dry weather there should be no dust, and in wet weather no mud, and as little noise as possible from the passing carriages. All these advantages are combined in the kind of road I allude to, besides being smoother than a macadamised road, even when the latter is in its most perfect state.

"In countries abounding with wood, various schemes have been adopted for the formation of roads of that material; but hitherto they have always been made by laying logs or planks parallel to, or at right angles with, the sides of the way. These logs are easily displaced, and soon cut up by the horses' hoofs; and, when once out of order, no road can possibly be worse. The improved road, on the contrary, will last five or six years without repair; and, were it not for the high price of timber in this country, might be adopted with the greatest advantage; and, being a plan of considerable national utility, possibly the government might be induced to allow the importation of timber for this purpose, duty free.

"The following instructions will be found sufficiently practical and explicit as a guide to the construction of roads on this principle:—

"1. *Prepare a hard and level bed of gravel or broken stone covered with sand, and well rolled, about nine inches lower than the intended surface of the road.*

"2. *Take logs of timber of sufficient diameter, and, by means of equi-distant circular saws, cut them into equal lengths, of one foot each.*

"3. *These round logs must now be passed under a hexangular steel stamp, which cuts off the outside of the log, and leaves little more than the heart of the tree, in the form of a hexangular block.*

"4. *Two sides of this block must now be bored three inches deep, with an inch borer, for the reception of a wooden pin six inches long, which is to be driven into the hole already prepared in the log, the three inches of the pin which project being inserted in the next log.* The operation of laying the blocks of wood, and driving the pins, proceeds rapidly, and the surface of the road soon assumes a beautiful checkered appearance, somewhat resembling an inlaid floor; and, the fibres of the wood standing vertically, and not horizontally, there is not a possibility of splintering. The whole is held compactly together by a narrow strip of stone pavement; and nothing now remains to be done, but to cover it with a thin coat of boiling tar, and on the tar a fine layer of sand, by which means every interstice is completely filled up, and moisture excluded.

"In addition to the advantages already mentioned, of never being either dusty or ruddy, this road is little inferior to a railroad in point of smoothness; so that it may be safely asserted that one horse will easily draw on it the burden of two.

"If, at the end of five or six years, (where the traffic is great,) the road should be so injured as to require repairing, it may be done by taking up the logs, sawing a new face, and replacing them, when the road will be again equal to new.

"The one which I saw constructed in the above-mentioned manner, was in one of the most frequented streets of a populous city, and, when I left that country, had stood between three and four years uninjured."

tion of the substratum on which the *blocks were to rest; that the pavement at Hovingham Hall likewise differed from the plaintiff's, *inasmuch as *the blocks tapered towards the base, and were driven into sand,* and consequently could not sustain much traffic, or *afford each other the parallel support described in the plaintiff's specification, and which was of the essence of his invention;* and that, upon the whole, the plan adopted by the defendant was substantially an infringement of the plaintiff's patent.

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Mr. Galloway gave similar evidence, and stated that he did not consider it an essential part of the plaintiff's claim that the grain of the wood should be absolutely and mathematically vertical, that being impracticable; and that a pavement formed of blocks shaped like those used by the defendant, was, substantially, an infringement of the plaintiff's patent,—the only object of placing the blocks with the grain in a vertical position, being, that the end of the fibre should bear the traffic, so as to ensure the greatest amount of durability.

Colonel Jackson stated that he had read Heard's letters, and had seen the pavement in St. Petersburg, therein referred to; that, in his opinion, the suggestions contained in those letters were not sufficient to enable any one to form a road that would be practically useful; that the pavement at St. Petersburg was exposed to but little traffic; and that, in forming it, the blocks, as sawed from the tree, were marked on the surface in the required form,—hexagonal or square,—and then roughly shaped with a hatchet.

With reference to the slight bevelling of the blocks described in the specification, Dr. Farey said, (and in this Colonel Jackson agreed with him,) that its only object was, to allow for the convexity of the road.

Heard's second letter, dated the 13th of October, 1832, was as follows:—

"I hasten to supply the omission in my communication on the construction of a wooden road upon new principles, by informing you that the first experiment was made in St. Petersburg, before the house of the governor-general, in the street called The Great Morskoi. After this piece of road had stood several years unimpaired, the plan was tried on a large scale, in the street called The Maloi Millionne; and this trial only seemed to confirm the good opinion the public had already conceived of this mode of pavement; and, consequently, in the course of last summer, (1832,) The Nevsky Perspective, from The Admiralty to The Anitchkin Palace, was paved in a similar way,—not, however, from one side to the other (this street being of an extraordinary width,) but two strips, each sufficiently wide for two carriages to drive abreast, the original stone pavement being left in the intermediate spaces.

"I neglected also to state, in my communication, that a road constructed in this manner should not be bound together so tight by the side pavement, as to prevent the possibility of a slight expansion of the wood from the absorption of moisture. I was led to make this remark, by the swelling up of a small piece of foot-pavement on a cast-iron bridge, when the iron sides preventing the least expansion, the natural consequence of the absorption of moisture was, the swelling up of the pavement; but this never occurred, where the log pavement was held together by a strip of common stone pavement.

"I think it also necessary to observe, that, although the above-mentioned streets, in which the experiments have been made, are places of so great traffic that roads constructed on the McAdam principle were found of insufficient durability, yet no excessively heavy loads comparable to the wagons and heavy carts used in England, ever passed over them. I therefore would not pledge myself that such a road, however desirable for the West end of London, would bear, uninjured, the enormous burdens continually passing through the streets of the city.

But Mr. Galloway thought its object was, to allow for the expansion of the base of the block, from wet, or other causes.

*821] Mr. Hall Hart, and Mr. Moses Braithwaite, civil *engineers, also gave evidence as to the novelty and utility of the plaintiff's invention.

No evidence was offered on the part of the defendants: but it was insisted that the alleged invention had been anticipated as well by Heard's letters, as by the paving laid down by Sir W. Worsley of Hovingham Hall; and that the defendant had been guilty of an infringement.

On the part of the plaintiff, it was submitted that the principle and essence of his invention was, that the blocks of wood used should be of similar sizes and dimensions,—whether sexangular, triangular, square, or any other form of block that would go together,—and placed with the grain of the wood in a vertical position, each block deriving lateral support from those adjoining; that the evidence conclusively established its novelty and utility; and that the pavement constructed by the defendant was, substantially, an imitation, and a fraudulent evasion of the plaintiff's patent,—the inclination, or deviation of the grain or fibre from the vertical line, being a mere colourable evasion.

In his summing up, the learned judge told the jury, that the plaintiff, in his specification, claimed as his invention, not every mode of paving streets, highways, &c. with blocks of wood, but a mode of paving with blocks fulfilling three conditions,—being of equal sizes and dimensions, whether square, hexagon, triangular, or of any other form,—having their sides perpendicular to the horizon, and parallel with each other, (subject to the slight bevelling necessary to allow for the convexity of the road,) so as to insure an equal lateral pressure from their surface to their base,—and with the grain or fibre of the wood *vertical*, that is, as vertical as the growth of the tree would permit; that the infringement complained of consisted in the use, by the defendant, of blocks of wood presenting on the surface squares of equal sizes or dimensions, but differing from *822] the *plaintiff's blocks, in this, that two only of their sides were parallel with each other and with the adjoining blocks, the other two sides presenting an angle of about sixty-three degrees, the grain or fibre of the wood running at the same angle, and each block resting the upper surface of one of its sides upon a portion of the base of the opposite side of the block next adjoining it; that, the blocks used by the defendant, being of a rhomboidal form, not having the grain or fibre *vertical*, or all their sides perpendicular to the horizon, but the grain and two of the sides being at an angle of sixty-three degrees, and not being supported laterally by, but partially resting on, each other,—unless the jury were of opinion that it was a fraudulent imitation, and a merely colourable evasion of the plaintiff's patent right, they must find the first issue for the defendant.

The second issue,—whether the plaintiff was the true and first inven-

tor; and the third,—whether the invention was of any use, benefit, or advantage to the public; the learned judge directed the jury to find for the plaintiff, there being reasonable evidence that the plaintiff was the true and first inventor, in the sense of being an introducer from abroad, and that the invention was useful.

As to the fourth issue,—calling the attention of the jury to the difference of opinion between Dr. Farey and Colonel Jackson on the one hand, and Mr. Galloway on the other, with regard to the object of the beveling of the blocks,—his lordship left it to them to say whether the specification in this respect sufficiently described the nature of the invention.

As to the fifth issue,—whether the invention, before the granting of the letters-patent to the plaintiff, had been, wholly or in part, publicly or generally *known, used, practised or published*, in England,—the direction was, in substance, as follows:—This plea embraces in [*823] *it three different allegations. The first is, that this invention had previously been *actually used*; the second, that it had been *publicly known*; the third, that it had been *published*,—at least in part. As to the alleged user, the only evidence was, that a similar pavement had previously been laid down at Sir William Worsley's. The hexangular blocks, however, there used, differed in an essential particular from those of the plaintiff, *inasmuch as they did not laterally sustain each other from the surface to the base, but tapered from the top downwards, so as to drive into the substratum of sand*. If the mode of forming and laying the blocks at Sir William Worsley's had been precisely similar to the plaintiff's, that would have been a sufficient user to destroy the plaintiff's patent, though put in practice in a spot to which *the public* had not free access. The pavement laid down at St. Petersburg unquestionably was of such a description, and the user of an extent, that, if it had existed in England prior to the grant of the letters-patent to the plaintiff, would have rendered them void. Then, has it been generally *known* and *published*? I think those words mean different things. "Generally known" means, known to the public generally, or at least to that portion of the public whose attention is turned to such matters. But "published" means offered or dedicated to the public. Was the invention published or offered to the public, to such an extent as that it was generally known amongst engineers and persons likely to take an interest in such a matter? The method of paving described by Mr. Heard was, no doubt, very similar to the plaintiff's. Finlayson's may be altogether laid out of consideration. The question upon this part of the issue will be,—not whether the description furnished by Heard in his communications to The Society of Arts would have been sufficient to sustain a patent, or whether, if Heard had taken out a patent, the plaintiff's mode would have been an infringement; but whether Heard's letters made *known to the world a mode of paving substan- [*824]

tially like the plaintiff's. The mode described by Heard certainly does not entirely coincide with the plaintiff's, especially with respect to the preparation of the foundation or substratum. *But it agrees with it in this important particular, viz. that the blocks are to be laid with the grain or fibre of the wood in a vertical position.* It will be for you to say, whether or not the two modes are substantially the same, and whether there has been such a previous publication as to have already made this a portion of the public stock of information. The witnesses for the plaintiff,—scientific men, and others,—certainly disavowed all previous knowledge of the publication of Heard's letters. The evidence shows, (a) that, at the time Heard's letters appeared in the Transactions of The Society of Arts, the members of that body were about eight hundred in number; that they had subsequently been reduced to about three hundred; that, in the year 1842, the society again became more numerous; and that the Transactions were printed periodically for distribution amongst the members, and were likewise sold to persons who were not members, and might be purchased at any bookseller's. The next question is, whether this mode of paving with wood had previously been published in England, in the sense in which I understand the Court of Common Pleas to have dealt with that word in the case of *Stead v. Williams*. Upon this point, I shall, sitting here, adopt the law as laid down in the judgment of the court in that case,—without, however, holding myself bound by that opinion, should the point ever come before me sitting in a court of error. The court there say: "If the invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee
 *825] is not the first and true inventor within the meaning of the statute, whether he has himself borrowed his invention from such publication or not; because we think the public cannot be precluded from the right of using such information as they were already possessed of at the time of the patent granted. It is obvious that the application of this principle must depend upon the particular circumstances which are brought to bear on each particular case. The existence of a single copy of a work, though printed, brought from a depository where it has long been kept in a state of obscurity, would afford a very different inference from the production of an encyclopædia, or other work in general circulation. The question will be, whether, upon the whole evidence, there has been such a publication as to make the description a part of the public stock of information." It will be for you to say, whether Mr. Heard, who clearly first brought the knowledge into England, by the communications made by him to the scientific body, made a present of it to the public, so as to prevent an individual from appropriating it to himself, by taking out a patent for it. If you are of that opinion, your verdict must, on the fifth issue, be for the defendant.

(a) This appeared upon the cross-examination of Dr. Farey.

Upon the sixth issue,—whether the title of the invention in the letters-patent was too large, uncertain, vague, and ambiguous; and, upon the seventh,—whether the invention was an improved mode or method of making or paving roads, &c.; the learned judge directed the jury to find for the plaintiff.

The jury returned a verdict for the defendant on the first and *fifth* issues; and for the plaintiff, on the *second*, third, sixth, and seventh issues; and, as to the fourth issue, they were discharged, by consent.

Shee, Serjt., in Michaelmas Term last, on the part of the plaintiff, obtained a rule nisi for a new trial, on the *ground of misdirection, and that the verdict on the first and fifth issues, was against the evidence. [*826]

Channell, Serjt., and *Petersdorff*, in Trinity term last, showed cause. There clearly was no evidence of infringement. The blocks used by the defendant differed substantially from those described in the plaintiff's specification,—even assuming that his claim was not limited to hexagonal, triangular, or square blocks, but embraced blocks of every form, provided their dimensions were similar. The learned judge, therefore, was warranted in directing the jury to find for the defendant upon the first issue, unless they were of opinion that the mode adopted by the defendant was a fraudulent attempt to evade the prohibition in the plaintiff's patent. All the witnesses agreed that the verticality of the grain or fibre of the wood, and the lateral contact and support from the surface to the base of the block, were of the essence of the plaintiff's alleged invention: whereas, in the plan adopted by the defendant, neither was the grain vertical, nor did each block receive lateral support from those next to it; but one was made to rest upon a portion of the base of another, the grain or fibre being at an angle of about forty-five degrees.

It may be that a little confusion has been introduced into this case, from a misapprehension of the true ground of the decision in *Stead v. Williams*, 7 M. & G. 818, 8 Scott, N. R. 449. It was there held, that, if an invention has already been made public in England, by a description contained in a work, whether written or printed, which has been publicly circulated, one who afterwards takes out a patent for it is not the true and first inventor within the meaning of the statute 21 Jac. 1, c. 8, whether he has himself borrowed his invention from such *publication or not. What the court intended to decide there, was, that publication amounted to a defence, without adverting to the particular issue to which such a defence would be applicable. The learned judge in this case treated the fifth issue as distributive, as the plaintiff had done by his replication. There was distinct evidence as to publication. [MAULE, J. The question is, whether publication is enough, without user.] *Stead v. Williams*, and other cases, show that it is. [MAULE, J. Previous publication shows that the patentee is not the true and first inventor. But, does it, without more, establish a de-

fence?] TINDAL, C. J., thus deals with this question, in his summing up in *Cornish v. Keene*, Webster's Patent Cases, 501: "Sometimes it is a material question to determine whether the party who got the patent was the real and original inventor or not: because these patents are granted as a reward, not only for the benefit that is conferred upon the public by the discovery, but also to the ingenuity of the first inventor; and, although it is proved that it is a new discovery so far as the world is concerned, yet, if any body is able to show, that, although that was new,—that the party who got the patent was not the man whose ingenuity first discovered it,—that he had borrowed it from A. or B., or taken it from a book that was printed in England, and which was open to all the world,—then, although the public had the benefit of it, it would become an important question whether he was the first and original inventor of it." [WILDE, C. J. If it could be proved that the plaintiff derived his information from a book published in England, the patent would undoubtedly be void.] In the course of the argument of the case of the *Househill Company v. Neilson*, Webster's Patent Cases, 718, n., in the House of Lords, Lord LYNTHURST, C., observed: "If *828] the machine is published in a book, *distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not that an answer to the patent? It is continually the practice, on trials for patents, to read out of printed works, without reference to any thing that has been done." And Lord BROUGHAM adds: "It negatives being the true and first inventor; which is as good as negating the non-user." [MAULE, J. Supposing the only issue to be, whether the plaintiff was the true and first inventor, and it is shown that some one else had previously published the invention to the world, would not that entitle the defendant to a verdict?] The authorities show clearly that it would. In *Morgan v. Seaward*, 2 M. & W. 544, 1 Webster's Patent Cases, 187, ALDERSON, B., says: "It is certainly a most important question, what are the limits of what a man may do without its being a publication, and a question on which much remains to be discovered: the law is in a very confused state. In the case of *Lewis v. Marling*, 4 C. & P. 52, 57, 1 Webster's Patent Cases, 490, 498, 10 B. & C. 22, 4 M. & R. 66, I should certainly have entertained very considerable doubts. If the question is to be put altogether on the ground of the *public use* of the invention, how did Dr. Brewster lose the benefit of his invention of the kaleidoscope; because it had been previously published in a book, if it had not been used, though made known to all the world before? If Dr. Hall had published his discoveries in a book, I apprehend that would have put an end to Dollond's patent.(a) Much obscurity has been introduced into this question by the use of loose expressions and *dicta*." And, on *Morgan v. Seaward* being cited in *Carpenter v. Smith*, 9 M.

(a) See *Dollond v. —*, 1 Webster's Patent Cases, 53.

& W. 300,(a) the same learned judge observed, p. 302: "How, [*829
 *then, do you get over the case of the invention for which a patent was avoided(b) because it had been previously published in a book? the principle being, that it could be appropriated by anybody, because it had already been given to everybody." [MAULE, J. To make the direction in this case right, it is surely necessary that prior publication should be a defence.] The learned baron evidently intended to act upon the decision of this court in *Stead v. Williams*. The defendant having a clear right to the verdict upon not guilty, the court will not grant a new trial, merely because, in disposing of the other issues, the judge directed the jury to find for him on the *fifth* issue instead of the *second*.

Shee, Serjt., *E. James*, *Webster*, and *Huret*, in support of the rule. The making of wood pavement of blocks of any form, provided they are of equal dimensions, and made to fit together and support each other, and provided the grain or fibre of the wood is vertical,—not vertical in the strict sense of the term, but as contradistinguished from horizontal or transverse,—is an infringement of the plaintiff's patent. [MAULE, J. A slight and colourable deviation from the vertical line, would, probably, be within your description. But the question is, whether blocks with the grain or fibre inclined in a *substantial* degree, can be said to be vertical within the prohibition of the patent.] Specifications are to be read in a spirit of fairness and candour, and not with a predisposition to pick holes in them: *per* PARKE, B., and ALDERSON, B., in *Russell v. Cowley*, 1 Webster's Patent Cases, 470; *Neilson v. Harford*, 8 M. & W. 806, 1 Webster's Patent Cases, 331.(c) So construing this specification, the proper question to be submitted to the jury, *upon the first issue was, whether the defendant had or [*830 had not, under colour of a specious variation in the form of the block, substantially infringed the plaintiff's patent; as was done by TINDAL, C. J., in *Walton v. Potter*, 1 Webster's Patent Cases, 586, by CRESSWELL, J., in *Walton v. Bateman*, 1 Webster's Patent Cases, 616, and by ALDERSON, B., in *Morgan v. Seaward*, 1 Webster's Patent Cases, 171. TINDAL, C. J., in *Walton v. Potter*, told the jury that, "Where a party has obtained a patent for a new invention, or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form, or in immaterial circumstances, the nature or subject-matter of that discovery, to obtain either a patent for it himself, or to use it without the leave of the patentee; because that would be, in effect and in substance, an invasion of the right; and therefore what you have to look at upon the present occasion, is, not simply whether, in form or in circumstances that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent, but to see whether in reality, in

(a) 1 Webster's Patent Cases, 540.

(b) Dr. Brewster's Kaleidoscope.

(c) And see *McAlpine v. Mangnall*, 3 Man. Gr. & Scott, 496.

substance and in effect, the defendants have availed themselves of the plaintiff's invention, in order to make that fabric, or to make that article, which they have sold in the way of their trade,—whether, in order to make that, they have availed themselves of the invention of the plaintiff.” CRESSWELL, J., uses similar language, in *Walton v. Bateman*. And ALDERSON, B., in *Morgan v. Seaward*, says: “The question (as to infringement) would be, simply, whether the defendants' machine was only colourably different, that is, whether it differed merely in the substitution of what are called mechanical equivalents, for the contrivances *881] which are resorted to *by the patentee. I think, when you are told what the invention of the plaintiffs really is, and what the machine of the defendants really is, you will see that those differences which Mr. Donkin and others point out as existing between the one machine and the other, are, in truth, differences which do not affect the principle of the invention. Therefore, the two machines are alike in principle, one man was the first inventor of the principle, and the other has adopted it; and, though he may have carried it into effect by substituting one mechanical equivalent for another, still you are to look to the substance, and not to the mere form, and, if it is in substance an infringement, you ought to find that it is so.”

As to the fifth issue, there was a clear and manifest misdirection. This court did not, in *Stead v. Williams*, affect to lay down any distinct rule as to what constitutes a thing part of the general stock of public information, but treated it as a question to be left to the jury in each case. [MAULE, J. Nobody contended, in that case, that the fact of publication had any operation except upon the issue as to the patentee being the true and first inventor. Here, the fifth plea is founded, not upon any particular branch of the patent, but upon the general law. I think the jury ought to have been directed to find for the defendant upon the second, instead of the fifth, issue.] In *Huddart v. Grimshaw*, Dav. Pat. Cas. 265, 1 Webster's Patent Cases, 85, Lord ELLENBOROUGH says: “If, prior to the time of the obtaining a patent, any part of that which is of the substance of the invention has been communicated to the public in the shape of a specification of any other patent, or is a part of the service [science?] of the country, so as to be a known thing, in that case he (the inventor) cannot claim the benefit of his patent.” That *evidently points, not to a mere publication in a *882] book, but to an actual user. The language of Lord LYNDEHURST, C., and Lord BROUGHAM, in the case of *The Househill Company v. Neilson*, 1 Webster's Patent Cases, 678, is to the same effect,—specially excepting a case like the present, where the public had acquired nothing. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court.

This was an action on the case for an infringement of a patent for wooden pavement. The defendant pleaded several pleas, of which it

is necessary to mention only the first, which was not guilty,—the second, which denied that the plaintiff was the true and first inventor,—and the fifth, which stated, that, before, the letters-patent, the invention had been and was wholly and in part publicly and generally *known, used, practised, and published* in England.

The cause was tried before PARKE, B., at the last summer assizes for the county of Surrey, when a verdict was found for the defendant on the first and fifth pleas, and for the plaintiff on the second; and, a rule nisi having been granted for a new trial, on the ground of misdirection, the case was argued during the last term.

The directions complained of were, as to the issues on the first and fifth pleas.

On the first, the direction was, in effect, that there was no evidence of infringement, unless the jury thought that there had been a fraudulent evasion,—of which the learned judge said he saw no satisfactory evidence: but he left that question to the jury. The jury thought there had been no fraudulent evasion; and they found for the defendant, under the direction of the judge, that there was no other evidence of infringement.

*Upon a careful consideration of the evidence, we are of opinion that there was no evidence to justify a jury in finding [833 that there had been an infringement; that is, a substantial resemblance to the plaintiff's invention, in particulars to which his exclusive right extended.

We think, that, upon the true construction of the patent and specification, it is no invasion of the right of the plaintiff, to pave with wood, or to pave with wooden blocks of equal dimensions. Indeed, on the argument, it was not contended that the patentee had an exclusive right to *all* modes of paving with wood, or with wooden blocks of equal dimensions. But it was insisted that the mode of paving adopted by the defendant, though with blocks whose grain was considerably inclined to the vertical line, was, substantially, the same as the plaintiff's invention,—which requires that the blocks should be placed “with the grain of the wood in a vertical position.” And we think it must be conceded, that, if the two modes of paving had been substantially the same, but a slight and immaterial inclination had been given to the grain by the defendant,—either in order to make a colourable difference between his pavement and the plaintiff's, or for any other purpose,—it would have been an invasion of the patent. But we think the evidence does not show such substantial identity, but a substantial difference; and that, if the question had been left to the jury, and they had found for the plaintiff, the verdict ought to have been set aside, as a verdict against evidence.

The question of fraud, which was the only one left to the jury on this plea, appears to have been left in consequence of the plaintiff's in-

sisting, at the trial, that there was a fraudulent intention to evade the prohibition of the letters-patent. It appears to us, that the intention was immaterial; and that, even if the jury had found fraud, the verdict *834] ought to have been for the *defendant; and that there was no misdirection in this respect, of which the *plaintiff* can complain, inasmuch as the proper direction would have been, that the verdict should have been found for the defendant absolutely, instead of conditionally, if there were no fraud.

It may be observed, that, in the case of *Heath v. Unwin*, 13 M. & W. 593, the Court of Exchequer seems to have deemed it material to consider the intention of the defendant, in determining whether he had infringed a patent. But, in that case, the evidence negatived any such intention; and the other circumstances of the case were not such as to show an infringement; so that there was no decision as to what the effect of such intention would be. And we think it clear that the action is maintainable in respect of what the defendant *does*, not of what he *intends*.

As to the issue on the fifth plea, the direction was, that the verdict should be for the defendant, if the invention was *known and published* before the patent, though *not used*. But this plea,—which is the same as the sixth in *Stead v. Williams*,—is substantially a plea of public user, which is a good plea under the statute of James, and would not be a good plea without the averment of *user*: for, although, in *Stead v. Williams*, proof of publication was held to show that the plaintiff was not the true and first inventor, and to sustain a plea that he was not such true and first inventor, the publication given in evidence there was, in fact, a publication by another person long before the plaintiff *had invented*,—who was, therefore, not the first inventor; on the principle that “the first person who *discloses* the invention to the *public*, is considered as the inventor.” (a) Yet it does not follow, that a plea only *835] stating that the *invention was *known and published*, in the terms of this plea, not mentioning *user*, would be a good plea. If such a plea stated that the knowledge and publication were *before the plaintiff invented*, it might be an argumentative denial of the plaintiff's being the first inventor: but, as it only states that the knowledge and *publication* were *before the letters-patent*, it is no denial at all of the plaintiff's being the first inventor, which is alleged in the declaration, and is not denied by this plea; and, as such knowledge and publication,—i. e., a knowledge and publication *after the plaintiff's invention*,—we think, would not avoid a patent granted to the true and first inventor, who, having invented, had obtained his patent before his invention was used, the fifth plea is not a double plea, but is a plea which sets up the single defence of user, of which user there was no evidence; so that the proper direction to be given was, that the verdict should be

(a) Per Lord Lyndhurst, 7 M. & G. 842.

for the plaintiff, instead of the contrary direction, which was given by PARKE, B.

CRESSWELL, J., in *Stead v. Williams*, understood this plea in the above sense, and left to the jury, on a plea like this, the question of user only; which direction of CRESSWELL, J., was clearly wrong, if the evidence of publication, *without user*, would sustain the plea: and no objection was taken to this direction.

It appears, therefore, that the proper direction was, that the verdict should be *for the plaintiff* on the *fifth* plea, inasmuch as there was no evidence of *user*. But, as the *publication* given in evidence was *clearly before the plaintiff's invention*, it sustained the *second* plea, that the plaintiff was not the true and first inventor: and the jury ought to have been directed to find *for the defendant* on the *second* plea, in the event on which they were directed to find for him on the fifth. And, as the defendant was entitled to a verdict on one of these two pleas, (the second and fifth,) and as he has had a *verdict on the general issue, [*836 which we think was properly given, we do not think there should be a new trial, unless the defendant insist on retaining his verdict on the fifth plea.

We, therefore, discharge the rule, on the defendant's consenting that the verdict shall (if the plaintiff think fit) be entered for the defendant on the second plea, and for the plaintiff on the fifth. But, if the defendant refuse such consent, the rule must be made absolute.

Rule accordingly.(a)

(a) The defendant consented to the verdict being entered in the manner suggested; but the plaintiff declined to have it so entered; and therefore the verdict stood.

*VALPY and Others, Assignees of the Estate and Effects of [*837
EDWARD BROWN, a Bankrupt, v. GIBSON and Another.
July 8.

A., a merchant at Birmingham, bought goods of B. & Co., commission-agents at Manchester and Leeds. On the 20th of March, 1844, the goods were, by A.'s direction, sent to L. & Co., shipping-agents at Liverpool, employed by A. to receive and forward them to Valparaiso; and, on the same day, B. & Co., wrote to L. & Co., advising them of the transmission of patterns, which they requested them to ship with the goods, "as A. might direct the same to be shipped." The goods were, on the 4th of April, shipped by L. & Co. on board a vessel bound for Valparaiso, and were afterwards re-landed by order of a member of the house at Valparaiso, to which they were consigned by A., and sent to B. & Co.'s house at Manchester, for the purpose of being re-packed in smaller cases. The price of the goods became payable on the 26th of April, but was not paid, A. having in the mean time become insolvent:—

Held, that the property and possession of the goods had vested absolutely in A., the vendee, before they were re-delivered to B. & Co. at Manchester; and that, by such re-delivery, the latter acquired no new rights as unpaid vendors.

Semble, that the *transitus* was at an end when the goods reached the hands of L. & Co.; but that, at all events, the right of B. & Co. to intercept the goods was gone, when A. had exercised an act of ownership over them, by re-landing them, and sending them to be re-packed.

24 March 490;

A contract of sale may be complete and binding, though silent as to the price (such silence being equivalent to a stipulation for a *reasonable* price,) and as to the time and mode of payment.

TROVER, by the plaintiffs, as assignees of Edward Brown, a bankrupt. The first count alleged a possession by Brown, and a conversion before the bankruptcy. The second count, a possession by the plaintiffs as assignees, and a conversion after the bankruptcy.

The defendants pleaded,—first, not guilty,—secondly, to the first count, a denial of Brown's possession,—thirdly to the second count, a denial of the possession of the plaintiffs as assignees. Issue thereon.

At the trial before CRESSWELL, J., at the Liverpool summer assizes, 1846, a verdict was found for the plaintiffs, damages 773*l.* 19*s.*, subject to the following case:—

*838] The plaintiffs are the assignees of Edward Brown, *against whom a *fiat* issued on the 7th of May, 1844, upon an act of bankruptcy committed the day before; under which *fiat* the plaintiffs were appointed his assignees.

Brown had been a general merchant at Birmingham. The defendants were general commission-agents, having offices at Manchester and Leeds, and trading under the firm of Gibson, Ord, & Co. The action was brought to recover the value of four parcels of goods under the following circumstances:—

On the 12th of March, 1844, Brown wrote the following letter to the defendants' Leeds house:—

“Messrs. Gibson, Ord, & Co.

“Gentlemen,—My brother William (who is in Hegan, Hall, & Co.'s house) accidentally mentioned your name to me the other day. On these very slight grounds, I address you. I am now shipping heavily to the Brazils: and Messrs. Miller, Mackay, & Co. are anxious I should send out some woollen cloths. Mr. Miller will accompany me to Leeds in a few days; but I am anxious to have some information in the interim, whereby to regulate my proceedings. In Manchester, the furnishers draw upon me at two months from date of invoice: and I should wish this mode, if possible, adopted in Leeds. May I, therefore, venture to ask if I may avail myself of your services as agents in Leeds? Mr. Miller will himself select such goods as he may want; but he would be equally ignorant with myself of the proper quarters in which to apply.

(Signed) “E. BROWN.”

On the 16th of March, Brown wrote the following letter to the same:—

“Birmingham, 16th March, 1844.

*839] “Gentlemen,—I have as yet no communication from your Manchester friends. In the mean time, I am anxious *you should push forward the enclosed, which has reached me as an order; and I need not add that it must be done on the lowest possible terms. The

goods are for the Valparaiso market; and I trust the transaction may lead to others of a more important character. I copy the order as received, and I doubt not you will fully understand it. This has been delayed some little time; and, if possible, I should be glad to have the goods in Liverpool in the course of next week, as they would then accompany other matters for the same destination, and for the same party. Mr. Miller will select for me for my own shipments; but in this matter I am sure I may rely on your placing me on the lowest possible terms, as I can only charge a very trifling commission.

(Signed) "E. BROWN."

"P. S. Do say if you understand the order as copied from the original, and when I may have it. I will then send mark and consignment." [Here followed an enumeration of the goods—12 pieces or ends of cloth.]

On the 20th of March, Brown wrote the following letter to the same:—

"Birmingham, March 20th, 1844.

"Gentlemen,—I have your esteemed favour of yesterday's date, referring to the Valparaiso order. My information is but slight; and, if any error be made, it will entirely rest with my correspondent. I have no interest in the matter; and, though anxious to be right, I shall not blame myself if wrong. The only additional information I can give you is the following quotation, in allusion to the superfine—'Let these be good, and 5 \$. @ 6, in bond.'

"The present I wish you to understand a positive order. If I do not execute it, another will: and you must, therefore, do that which you conceive to be right, and I shall be satisfied. I shall get a very trifling *commission upon it; but, as it formed part of a large order for [*840 hardware, I could not refuse. For the future, I am promised patterns and prices. I am shipping heavily this week, for the same party, from Liverpool; and the order has been so long delayed that I would exclude one or two impossible varieties, so as to have it there in the course of the week: say, by Saturday morning. Invoice to me, without fail, by Friday's post. I would not press you in the matter, but that I feel anxious the whole order should be in one vessel; and, if you can make a push, and oblige me in this, I should esteem it a favour. On this point, I shall not say more than that it is important I should have the invoice on Friday, if practicable.

"Mark L C. 4 forwarded to

"Leech, Harrison, & Co., Liverpool.

"By railway.

"I have a letter this morning from Mr. Miller, who would leave Liverpool to-day. I shall hope to have early advice of Mr. Miller's proceedings, and the probable amount of his selections.

(Signed) "E. BROWN."

On the 28d of March, Brown also wrote to the defendants a letter, from which the following is an extract:—

"In the Valparaiso order I am paid cash one month from date of invoice. I will pay you cash at that time, taking the usual discount. I hope you will not press the point of my drawing on Miller, Mackay, & Co., to your order. I would much rather, at a personal inconvenience, pay cash. Indeed, I should at all times prefer the latter mode to that of accepting the bills, if you will arrange to take it at two months from date of invoice. This gives me ample and sufficient time: and I am the
*841]

*more anxious to have that mode agreed to by you, because Hegan, Hall, & Co. are now pressing to send out a shipment of your goods to China; and Mr. Hagman asserts, that you are better able to assort for this market than any other house, and even goes the length of saying that you have a reputation on the other side. If you insist upon it, I will say a shorter date; but I do think that two months, for shipment to such distant markets, is as little indulgence as I ought to have. I should be most happy to see any member of your firm in Birmingham, and to give any further explanation which may be deemed necessary. I will only add, that, if the proceedings of the Sydney house could, in any way, affect me but for good, I should think it dishonest to use you as I am doing.

"If you can possibly, let me have the V. [Valparaiso] invoice by Monday's post, and forward the goods on that day, to Leech, Harrison, & Co. If I can make terms with Hegan, Hall, & Co., I will ship from 1500*l.* to 2000*l.* by William. (Signed) "E. BROWN."

On the 25th of March, the defendant's Leeds house wrote the following letter to Brown:—

"Leeds, 25th March, 1844.

"We have your favour of the 23d, and respecting its contents, you will hear from our Manchester house. The goods for Valparaiso we are taking up, and have tried to have the invoice by this post, but could not manage it. The goods will go forward, as directed, to-morrow evening, and be in Liverpool by noon on Wednesday. The invoice we intend to send by first post in the morning.

(Signed) "GIBSON, ORD, & Co."

On the same day, the same house addressed the following letter to
*842] Brown:—

"Leeds, March 25th, 1844.

"Since closing our letter we have been able to complete the invoice, which we now enclose. The terms are left to your final arrangement with our friends in Manchester; but, for your guidance, the invoice is subject to $\frac{1}{4}$ discount, or approved bill at three months. The goods will go forward to-morrow evening; and a set of cards will be sent along with the goods; and we are preparing a duplicate set for your own reference patterns.

"The testimony borne by your friends, Messrs. Hegan, Hall, & Co., to the position our house has attained in the China trade, is fully supported by facts; for, we are more largely engaged in putting up goods

for that market than any other house in this country, and goods with our marks upon them bring a higher price in the China market than any other.

"We shall be glad to learn that terms have been arranged to mutual satisfaction; for, we believe, that, under your brother William's superintendence, you will be able to carry on a lucrative trade to the east."

(Signed) "GIBSON, ORD, & Co.

The following is a copy of the invoice, enclosed in that letter:—

"Leeds, 25th March, 1844.

"E. Brown, Esq., Oakfield,

"To Gibson, Ord, & Co.

[L]

1	60 in. superlative cloth	36 in. 37 in.							
1	Eng. Black	9088 ... 34½ ... 33½							
1	" "	89 ... 28½ ... 28							
1	" "	90 ... 25 ... 24½							
1	" "	91 ... 28 ... 27½							
1	Dark Blue	9092 ... 26½ ... 25½							
1	" "	93 ... 26½ ... 26 ... 164½ @ 15/6 ...				127	13	7	
1	" "	94 ... 28½ ... 27½							
1	" "	95 ... 26 ... 25½ ... 53 @ 16/ ...				42	8	0	
• 1	Dahlia	9096 ... 23 ... 22½			@ 14/6 ..	16	2	7	
1	"	97 ... 25½ ... 24½			@ 15/6 ..	19	3	7	[*843
1	Dark Green	98 ... 24 ... 23½							
1	" "	9099 ... 25½ ... 24½ 47½			@ 16/ ..	38	4	0	
						73	10	2	
12						243	11	9	
					Measure 5 7/8	12	3	7	
						241	8	3	
	Tillots, shields, &c. 1/6 ... 18/	Tin and wood case 26/				2	4	0	
						£233	12	3	

The invoice then stated three other similar parcels, of twelve ends each, of cloth, showing an aggregate amount of 774l. 0s. 3d. To which is added, commission 1½ per cent., 9l. 13s. 6d.; making a total of 783l. 13s. 9d.; concluding, "Per Pickford & Co., To Leech, Harrison, & Co., Liverpool."

The goods in question were selected by the defendants, and packed in four cases, and marked conformably to Brown's letter of the 20th March, and were, on the 26th, addressed and forwarded by railway by them to Messrs. Leech, Harrison, & Co., Liverpool, to whom the defendants on the same day sent the following letter:—

"We have forwarded a parcel to your address, per Pickford & Co., carriers, which contains the pattern cards of four cases sent by them this evening, marked [L] 1 to 4, for shipment to Valparaiso. You will please see that the same is put on board with the goods, and properly directed as *Mr. Brown of Birmingham may direct the same to be shipped*. The cases are to be delivered alongside the ship at 1/10 per cent., without further charge.

(Signed) "GIBSON, ORD, & Co."

"Weight of the four cases, 17 cwt. 1 qr."

Leech, Harrison, & Co. were shipping agents at Liverpool, and were
 *844] employed by Brown to receive and *forward the goods to Valparaíso; and they received them for that purpose on the said 26th of March.

On the 4th of April, Leech, Harrison, & Co. loaded the goods on board the Kestrel, a vessel bound for Valparaíso, giving, at the same time, the following letter to the ship-owners:—

“Messrs. F. & J. Brocklebank.

“We have L 1 @ 4 cases on board the Kestrel; and, as it is likely they will have to be relanded, we shall feel obliged by your giving proper directions to have them kept at hand until we receive an answer from our correspondents. (Signed) “LEECH, HARRISON, & Co.”

The goods were not entered or passed at the custom-house, as necessary on all shipments for foreign countries.

On the 8th of April, Brown wrote to the defendants' Manchester house, as follows:—

“Messrs. Gibson, Ord, & Co.

“I have been absent from this place for some days, which will, I trust, account for my apparent neglect of your last communication. I could not, for a moment, ask you to incur any risk, or deviate from any established rule, in my behalf. Although we have been for years a commission house, and in every instance paid by three months' acceptances, I will not ask the same indulgence. I will pay cash, and in one or two days before or after invoice. My motive in asking for a few days after invoice, is, the very simple fact, that, in cases where Miller, Mackay, Hegan, Hall, and others select for me, I cannot know precisely the amount required; and, if exceeding my limit, I might fairly expect a few days' breathing time, wherein to supply the excess.

*845] “I am, however, in this instance, quite willing to *provide the funds wherewith you shall make the purchase, and this will be convenient about the commencement of May: and I need not add that you will not exceed the amount remitted. This appears to me a novel mode of proceeding; but, for the present, I will accede to it, under the belief that it is a very common practice with Leeds houses.

“I beg you will not for a moment suppose that I consider your precautions as improper or uncalled for. Nay, the position of the house in Sydney would, to parties ignorant of our position, be a sufficient justification for any degree of doubt. (Signed) “EDWARD BROWN.”

To this the defendants, on the 10th, replied as follows:—

“Manchester, 10th April, 1844.

“We have to acknowledge the receipt of your favour of the 8th. Your proposal to furnish cash in the early part of May, for your order in course of execution, cannot but be satisfactory. But, should the

amount of the Valparaiso invoice be paid prior to that time, we shall have no objection to give you one month from the date of invoice on the goods for Rio, and so continue, if agreeable to you, to carry on our transactions. (Signed,) "GIBSON, ORD, & Co."

Whilst the goods remained on board the Kestrel, Mr. Alison, a member of the firm of Alison, Cumberlege, & Co., having houses at London and Valparaiso, came down to Liverpool, and, seeing the goods, ordered them to be re-landed, for the purpose of having them re-packed in eight cases, instead of four. Leech, Harrison, & Co. accordingly re-landed them, and, on the 12th of April, sent the goods to the defendants' *Manchester house; and, on the same day, sent to Brown [*846 the following letter:—

"Liverpool, 12th April, 1844.

"We duly received your favour of the 1st instant, but too late for us to ship the four cases [L] 1 @ 4, by the Inca, she having previously sailed. At Messrs. Alison, Cumberlege, & Co.'s request, we have now sent them to Messrs. Gibson, Ord, & Co., Manchester, to be re-packed, of which, no doubt, they have informed you; and we presume you will give the necessary instructions about them, as we do not write to Messrs. Gibson, Ord, & Co. None of your other goods have yet come. We propose to ship them on arrival by the Robert Whiteway, to sail at the beginning of next month. (Signed,) "LEECH, HARRISON, & Co."

The goods arrived at Manchester on the same day; and, on the same day, the defendants' Manchester house wrote to Leech, Harrison, & Co. the following letter:—

"Manchester, 12th April, 1844.

"Four cases have been delivered to us by the railway company, marked [L] 1 @ 4; and, on inquiry, we find they were forwarded by you. Will you be good enough to say what we are to do with them, or whether they have not been sent to us in error.

(Signed,) "GIBSON, ORD, & Co."

To this Messrs. Leech, Harrison, & Co., on the following day, replied thus:—

"Liverpool, 13th April, 1844.

"Messrs. Gibson, Ord, & Co.—In reply to your favour of the 12th instant, we forwarded four cases [L] 1 @ 4 to you by order of Mr. Edward Brown, of *Birmingham, who, no doubt, will instruct [*847 you respecting them.

(Signed,) "LEECH, HARRISON, & Co."

On the 15th, Brown wrote to the defendants' Manchester house the following letter:—

"Birmingham, April 15th, 1844.

"Messrs. Gibson, Ord, & Co.—Your favour of the 10th came duly to hand: and I am perfectly satisfied with your proposal. I shall remit

you for the Valparaiso order punctually, according to promise; but I shall be glad to know in the mean time what may be the probable amount of that selected by Mr. Miller for Rio. I have requested Leech, Harrison, & Co. to return you the four packages, in order that they may be converted into eight, retaining the proportions. Thus, the first package will have two black, two dark blue, one dahlia, one green. As I was merely a go-between, this requirement ought to have been furnished to me in the outset. I blame my correspondents' agents in London for the omission. I hope, however, you will charge for the additional trouble.

(Signed,) "EDWARD BROWN."

To this letter, the defendants replied on the 17th, as follows:

"Manchester, 17th April, 1844.

"Edward Brown, Esq.—We are in receipt of your favour of the 15th, and are pleased to find our proposal meets your approval. The amount of the goods ordered for Rio is 2000*l.*, so far as already packed, and, we believe, comprises the whole of your order through Mr. Miller. These goods are ready to send off at any moment; and, as we know it is important that no delay should take place in their shipment, we should
*848] be pleased if you could make some arrangement with *Messrs. Miller, Mackay, & Co., by which they might at once be forwarded. This we throw out as a suggestion for your consideration, having heard from our Leeds friends that these gentlemen are pressing for the goods, fearing that they may arrive too late for the season. The four cases cloths have reached us; and we are now re-packing them, in conformity with your wishes.

(Signed,) "GIBSON, ORD, & Co."

On the 26th of April, 1844, the price of the goods became payable to the defendants. On and before that day, and before the re-packing of the goods, Brown had suspended payment, and became insolvent, of which the defendants then heard.

The defendants had not been paid the price of the goods, or any part thereof, nor held, nor ever had, any security for such payment. No tender had ever been made of the price of the goods, or any part thereof.

The goods remained in possession of the defendants until and on the 10th of July, 1844, when a sufficient demand was made by the plaintiffs, as assignees, from the defendants, who refused to give up the same; and a conversion in law sufficient for the purposes of the action was admitted to have taken place.

The value was agreed to be taken at 778*l.* 19*s.* The defendants contended that they had a right to retain the goods from the assignees of Brown.

The question for the opinion of the court is, whether the defendants had a right to retain the goods. If the court shall be of opinion in the negative, then the defendants agree that judgment shall be entered up

against them for 778*l.* 19*s.* damages: and, if the court shall be of a different opinion, the plaintiffs agree that a judgment of nonsuit shall be entered against them, or otherwise, as the court may see fit, and that judgment *shall be entered accordingly;—the court to be at liberty to draw any inference of fact from the circumstances stated, which a jury ought to draw. [849]

The case was argued in Trinity term last, before WILDE, C. J., and COLTMAN, MAULE, and CRESSWELL, Js.(a)

Cowling, (with whom was *Martin*,) for the plaintiffs. The property in the goods in question passed by the sale, to Brown. They were sold on credit, and delivered according to the directions given by Brown. The *transitus* was at an end as soon as the goods reached the hands of Leech, Harrison, & Co., the agents of Brown. The fact that the defendants knew the goods were intended for Valparaiso makes no difference: for the purpose of selection, it was necessary they should have this information. Brown might, if he *pleased, have sold them at Liverpool. [CRESSWELL, J. Leech, Harrison, & Co. had no duty to perform towards the vendors, as to forwarding the goods.] [850] Certainly not. *Dixon v. Baldwin*, 5 East, 175, is precisely in point. There, A. and B., traders living in London, were in the course of ordering goods of the defendants, cotton manufacturers at Manchester, to be sent to M. & Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. and B. at Hamburg; and, on the 31st of March, A. and B. sent orders to the defendants for certain goods, *to be sent to M. & Co. at Hull, to be shipped for Hamburg, as usual*: and it was held, that, as between buyer and seller, the right of the defendants to stop *in transitu*, was at an end when the goods came to the possession of M. & Co. at Hull; for, they were, for this purpose, the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. "The goods," said Lord ELLENBOROUGH, "had so far gotten to the end of their journey, that they

(a) The points marked for argument were as follows:—

For the plaintiffs,—that the property and possession of the goods having vested absolutely in Brown, the defendants could not be entitled to retain them after they were sent back for the purpose of being packed in eight cases; there being no stoppage *in transitu* made by the defendants, and they having no right to make such stoppage; and the defendants neither having any lien after delivery by them under the circumstances stated, nor such lien (if any) reversioning after receiving the goods again in manner stated."

For the defendants,—that the right of property never passed from them; that the vendee, by his agent, having exercised his right, after seeing the goods, to reject them in their then state, and sent them back to the vendors, there had been neither delivery nor acceptance; that the goods were in transit when the vendee stopped payment; that Valparaiso was the place of destination, and the agents at Liverpool were only agents to effect the shipment to Valparaiso; that, in legal effect, the goods never left the vendors' warehouse, the vendee having exercised his right to reject them in the form in which they were actually sent to Liverpool, and to return them; that the defendants had a lien for the price; that the goods, lawfully, and with the bankrupt's assent, were in the vendors' possession at and ever since the time when the price was payable; and that, the price not having been paid or tendered, trover did not lie at the suit of the assignees."

waited for new orders from the purchaser, to put them again in motion, to communicate to them another substantive destination." There is no substantial difference between that case and the present. In *Dodson v. Wentworth*, 4 M. & G. 1080, 5 Scott, N. R. 821, one W., the occupier of a mill called Mickley Mill, near Ripon, had been in the habit of purchasing goods from the plaintiff, who sent them by a carrier to Boroughbridge, under a bill of lading, by which they were made deliverable "at Boroughbridge, to Mr. W., Mickley Mill, near Ripon." The goods were usually fetched from Boroughbridge, by the wagons of W. On the *851] 18th of August, 1841, the *plaintiff received from W. an order for 100 bales of flax, "*to be sent to Boroughbridge as usual.*" The flax was shipped, on the 21st, in a vessel which went to York, where the flax was unloaded, and put on board fly-boats (bound for Ripon) and conveyed to Boroughbridge, and was there deposited at a warehouse belonging to The Ouse Navigation Company, *where it ceased to be under the control of the carrier.* The flax arrived at Boroughbridge on the 4th of September; W. stopped payment on the 6th; on the 9th, the flax was stopped on behalf of the plaintiff; and on the 10th, it was taken under an execution at the suit of third persons. It was held that the *transitus* was at an end when the flax was deposited in the warehouse at Boroughbridge, the warehousekeepers being, for this purpose, the agents of the consignee; and, consequently, that the right to stop *in transitu*, was gone. So, in *Wentworth v. Outhwaite*, 10 M. & W. 436, H. & Co., of Hull, having sold to W., of Mickley Mills, thirty miles from Leeds, twenty mats of flax, they were, on the 10th of August, sent by railway to Leeds, and arrived at the defendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., giving him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart, and took away ten of the mats. On the 18th of August, H. & Co. sold to W. twenty other mats of flax, and a quantity of other goods. The flax was sent by railway to Leeds, and arrived duly at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at the defendants' warehouse, notice was given to W. by letter, which stated, that, unless the goods were sent for, they would remain there at warehouse-rents. On the 23d of August, W. sent his cart, and took away *852] ten *of the latter mats, leaving there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped *in transitu* at Hull; and, on the same day, the ten mats of flax of the second parcel were also stopped, at Leeds, by H. & Co. On the 11th of September, the sheriff entered, and seized all the flax in the defendants' warehouse sent by H. & Co., under an execution against W. On the 15th of September, there was a stoppage by H. & Co. of the remaining ten mats of the first parcel. Although it was

found by the jury, at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills, it was held that the *transitus* was at an end on the arrival of the goods at the defendants' warehouse. PARKE, B., there says: "When the goods arrived at Leeds, and notice was sent to Weatherall of their arrival, and that he was to pay rent, the carriers held them, not as agents for forwarding them, but for their safe custody; and they were, constructively, in the possession of the vendee. Again, I think the goods had arrived at their place of destination; for, that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition. In this respect, the case falls within the principle of *Dixon v. Baldwin*, in which Lord ELLENBOROUGH lays down the doctrine that the *transitus* is completely at an end when the goods arrive at an agent's, who is to keep them until he receives the further orders of the vendee." Here, the *transitus* was at an end when the goods arrived at Liverpool and were put on board the Kestrel. The circumstance of their having afterwards been landed, at the desire of Alison,—who for this purpose must be taken to have been the agent of Brown,—and sent to the defendants, at Manchester, to be re-packed, in no *respect varies [*853 the rights of the parties. The property and possession of the goods vested absolutely in Brown before they were re-delivered to the defendants' house at Manchester; and such re-delivery, for the purpose of re-packing the goods, clearly gave the defendants no new rights.

John Henderson, (with whom was *Knowles*,) for the defendants. The property in the goods never passed to the bankrupt. There was no contract in writing, and no acceptance of the goods, within the statute of frauds. There was clearly no contract until the second letter, of the 25th of March; and in that the *final* terms are expressly left open. Where a contract is silent as to price, the law will imply a promise to pay the value; but other terms cannot be implied. [WILDE, C. J. In *Hoadley v. Macclaine*, 10 Bingh. 482, 4 M. & Scott, 340, it was held, that, in all cases of executory contracts for the purchase and sale of goods, which are silent as to price, the law will infer that the parties intended to sell and to buy at a reasonable price. He also referred to *Fragano v. Long*, 4 B. & C. 219, 6 D. & R. 283.] That is so, where the contract is *executed* by the acceptance of the goods; but not where it is *executory* only, and the goods still remain in the possession, or under the control, of the seller: *Acebal v. Levy*, 10 Bingh. 376, 4 M. & Scott, 217. Besides, here the price was not left to legal inference: it was to be adjusted with third persons. Nor was there any acceptance. Neither the carriers, nor Leech, Harrison, & Co., nor the captain of the Kestrel, were agents to bind Brown in this respect. [CRESSWELL, J. Suppose the Kestrel had sailed with the goods on board, at what period would there have been an acceptance?] On the arrival

of the goods at their ultimate destination—Valparaiso. [MAULE, J.

*854] *Suppose Brown had looked at the goods on their arrival at Liverpool, and had approved of them, but had required them to be differently packed, would that have amounted to an acceptance? That assumes a totally different state of facts. No doubt, Brown might have rejected the goods after they had been repacked and sent back to Liverpool. [MAULE, J. I am by no means prepared to assent to that. Brown, or his agent, had no right to deal with the goods at all, unless he accepted them. Ordering them to be re-packed, amounts to an acceptance. WILDE, C. J. Suppose the goods had been sent to another packer to be re-packed?] It may be conceded, that, if they had been sent by Brown to a third person to be re-packed, that would have been an exercise of ownership. The delivery on board the *Kestrel* clearly was no acceptance. Brown never interfered. In *Hanson v. Armitage*, 5 B. & Ald. 557, A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger, to be forwarded in the usual manner: and it was held, that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2, c. 3, s. 17. ABBOTT, C. J., in delivering the opinion of the court, relied upon *Howe v. Palmer*, 3 B. & Ald. 321, where it was held that there could be no actual acceptance so long as the buyer continued to have a right to object either to the *quantum* or the quality of the goods.

Neither Brown nor his assignees had such a right of property and possession as to enable them to maintain trover, without first paying or tendering the price of the goods. In *Bloxam v. Sanders*, 4 B. & C. 941, 7 D. & R. 396, A., a hop-merchant, on several days in August, *855] sold to B., by contract, various parcels of hops. Part of them were weighed, and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was, the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time; whereupon A. gave notice, that, unless they were paid for by a certain day, they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B., who afterwards became bankrupt; and then A. sold the residue of the hops without the assent of B. or his assignees. Account-sales of the hops so sold, were delivered to B., in which he was charged warehouse-rent from the 30th of August. The assignees of B. demanded the hops of A., and tendered the warehouse-rent, charges, &c.; and A. having refused to deliver them, brought trover. The jury found that the defendant had not rescinded the contract of sale. It was held, that the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as, in order to maintain that action, the party must

have not only a right of property, but a right of possession; and that, although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price. BAYLEY, J., in delivering the judgment of court, there says: "Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price*; but the buyer has no right to have possession of the goods *till he pays the price*. The buyer's right in respect of the price is not a mere lien, which he will forfeit if he parts with the possession; but grows out of *his original ownership and dominion: and payment, or a tender of [856 the price, is a condition precedent on the buyer's part; and, until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession: *Tooke v. Hollingworth*, 5 T. R. 215. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*: *Mason v. Lickbarrow*, 1 H. Blac. 357; *Ellis v. Hunt*, 3 T. R. 464; *Hodgson v. Loy*, 7 T. R. 440; *Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; (a) but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right." In *Miles v. Gorton*, 2 C. & M. 504, goods were sold under an invoice which expressed that they remained at rent. The vendee subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a portion of the goods, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the vendee became bankrupt, and the bill was dishonoured. It was held that the assignees of the bankrupt vendee, could not, without paying the price, maintain trover against the vendor for the residue of the goods, which had remained *in his hands. [MAULE, J. That [857 was not a sale upon credit.] In *Wilmahurst v. Bowker*, 5 New Cases, 541, 551, 7 Scott, 561, the defendants sold to the plaintiffs a parcel of wheat under the following contract—"Sold, the 25th Oct. 1836, to Messrs. J. W. & Son, about 300 qrs. of wheat, as per sample,

(a) Vide 2 N. & M. 202 (b).

at 51s. per quarter, on board. Payment by bankers' draft on London at two months' date, to be remitted on receipt of invoice and bill of lading." The wheat was shipped on the 27th, under a bill of lading, making it deliverable to order or assigns; and the defendants caused an insurance to be effected thereon, and sent the plaintiffs the bill of lading endorsed generally, and an invoice stating the wheat to be shipped by order, and *for the account and risk* of the plaintiffs. On receipt of the invoice and bill of lading, the plaintiffs, instead of a "bankers' draft on London," transmitted to the defendants *their own acceptance* for the invoice price, which the defendants immediately returned, with an intimation to the plaintiffs that it was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo. It was held that the plaintiffs had not such a right of possession as to entitle them to maintain *trover* for the wheat. It was also held, (a) upon a count in case, that no right to the possession of the wheat, vested in the plaintiffs before the remittance by them of a bankers' draft on London; and, consequently, that, on their failure to comply with that condition, the defendants were justified in intercepting the delivery. (b) TINDAL, C. J., in delivering the judgment of the court, upon the former occasion, (c) said: "In order to maintain *trover*, the plaintiffs must not only have the right of property in the goods for *858] which the action is brought, *but the right to the possession also. And, in this case, admitting that the contract of sale vested the property of the wheat in the plaintiffs, yet before they acquired the right to the possession of the wheat, the plaintiffs were bound, by the terms and conditions of the contract, upon receipt of the invoice and bill of lading of the wheat, to remit to the defendants a bankers' draft on London, at two months' date, which they altogether failed to do. It was a condition obviously introduced for the security of the defendants, that they should not part with the possession of the wheat until the bankers' draft was remitted: and for this purpose the receipt of the invoice and bill of lading by the plaintiffs, and the remitting of the bankers' draft by them, are made, by the terms of the contract, concurrent acts; and, consequently, the entire failure in the performance of the latter act on the part of the plaintiffs, prevented the right of possession of the wheat from vesting in them." And, upon the second occasion, the same learned judge said: "There is no doubt that the *property* in the wheat passed to the plaintiffs under the contract; upon which point much of the argument before us has turned: but the question is, as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties under the contract, was, that the consignors should retain

(a) 2 M. & G. 792, 3 Scott, N. R. 272.

(b) This decision was overruled in the Exchequer Chamber: vide 7 M. & G. 882, 8 Scott, N. R. 571.

(c) 5 New Cases, 541, 551, 7 Scott, 561.

the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the bankers' draft, not upon the delivery of the wheat, but on the receipt of the bill of lading, which, in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading, and the remitting of the bankers' draft, to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors; so that, *in case the consignees failed in the performance of their stipulation, the consignors might withhold the actual delivery of the cargo." *Coates v. Railton*, 6 B. & C. 422, 9 D. & R. 593, is a distinct and conclusive authority on the subject. There, goods were purchased by a commission agent at Manchester, for A., to be sent to Lisbon. A. had no warehouse at Manchester, and the vendor delivered the goods to the commission agent, who was to forward them to Lisbon: and it was held that the *transitus* continued until the goods reached Lisbon, the place named by the vendee to the vendor as the place of ultimate destination, and that the latter had a right to stop them in the hands of the agents, the vendee having become insolvent. BAYLEY, J., there says: "It is a general rule, that, where goods are sold, to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination. In the several cases cited, the goods purchased were sent to the place where the vendee directed them to be sent. In *Rowe v. Pickford*, 8 Taunt. 83, a trader in London was in the habit of purchasing goods at Manchester, and of exporting them to the continent soon after their arrival in London. He had no warehouse in London; and the goods consigned to him usually remained in the wagon-office of the defendants, who were carriers, until they were removed for the purpose of being shipped. The trader purchased a parcel of goods at Manchester for the purpose of exportation, and the same were sent by wagon to London, and remained in the wagon-office at the time of the vendee's bankruptcy. It was held that the *transitus* was at an end. But, in that case, the vendor had sent the goods to the place where he was directed by the vendee to send *them; and it was then at the option of the latter to send them to any place on the continent. [*859

There was no ulterior place of destination named to the vendor. The decision there proceeded on the ground that the carrier's warehouse was the warehouse of the buyer, and, as between him and the seller, the place of ultimate destination, although the actual place of the ultimate destination of the goods was not to be fixed by the buyer until they reached the carrier's warehouse." And, after referring to *Leeds v. Wright*, 8 B. & P. 320, and *Dixon v. Baldwin*, the learned judge continues: "The principle to be deduced from these cases, is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination." So, here, admitting that [*860

the property in the goods passed to the bankrupt under the contract, the right of possession did not attach, but remained in the unpaid vendors, —the goods never having reached their place of ulterior destination. [MAULE, J. The letter of the 25th of March, addressed by the defendants to Leech, Harrison, & Co., advising them of the transmission of the parcel containing the pattern-cards, and requesting them to “see that the same is put on board with the goods, and properly directed, as Mr. Brown may direct the same to be shipped,” seems to bring the case very much within *Dixon v. Baldwin*.] That letter is not inconsistent with the first instructions given to the defendants, viz., to ship the goods for Valparaiso. The destination of the goods remained the same, though they were subject to Brown’s direction as to the mode of shipment. The marginal note of *Dixon v. Baldwin* is incorrect: Lord ELLENBOROUGH expressly founds his opinion upon the *bona fides* of the bankrupt, in giving up the goods, and not upon the circumstance of the bankrupt’s holding *861] possession of them under a claim of a *right to stop them *in transitu*. He also referred to *Tooke v. Hollingworth* and *Hanson v. Meyer*, 6 East, 614, 2 J. P. Smith, 670.

Cowling, in reply. The contract was complete, and the goods accepted, the moment the bankrupt had, by his agent, done an act that put an end to his right to reject the goods. The time of credit was agreed on: it expired on the 26th of April. If the defendants could not have stopped the goods *in transitu* at Liverpool, the mere fact of their coming into their possession for the purpose of being re-packed, clearly gave them no additional right. Lord ELDON, in speaking of this subject, in *Mackreth v. Symmons*, 15 Ves. 843, says: “The doctrine is probably derived from the civil law as to goods; which goes further than our law, by which, though the right of stoppage *in transitu* is founded upon natural justice and equity, yet, if possession, either actual or constructive, was taken by the vendee, the lien is gone. That was not so by the civil law. The Digest states, (a) ‘*Quod vendidi non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis, eo nomine, factum; vel etiam fidem habuerimus emptori sine ulla satisfactione*’;” which points at this article of security; but, with those excepted cases, the lien, according to the civil law, is so strong that the goods may be taken out of the possession of the individual who had obtained actual or constructive possession of them.” In *Bloxam v. Sanders*, after the expiration of the term of credit, the parties were in the same situation as if the sale had been originally a sale for ready money. [WILDE, C. J. If goods are sold on credit, and the vendee becomes bankrupt before payment, his assignees cannot take the goods.] Here, there was an absolute delivery. There was nothing upon which *862] a lien could attach, after the goods were put on board the Kestrel, or after they were received by *Brown’s agents. *Miles*

(a) Dig. Lib. 18, tit. 1, l. 19.

v. Gerton and Wilmskuret v. Bowker were not, like this, cases of sales on credit. In *Coates v. Railton*, the buyer of the goods bought as agent for persons at Lisbon who were named. To assimilate the present case to that of *Coates v. Railton*, the purchase should have been made on behalf of persons residing at Valparaiso: whereas, here, the defendants dealt with Brown as a principal. And, although they knew that the goods were destined for the Valparaiso market, as far as they were concerned, the *transitus* was at an end when the goods reached the hands of Leech, Harrison, & Co.; or, at all events, when they were put on board the Kestrel.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:—In this case a verdict was found for the plaintiffs, for 773*l.* 19*s.*, subject to a special case; and it was agreed that the court should be at liberty to draw any inference of fact from the circumstances stated, which a jury ought to draw. The action was in trover, by the plaintiffs, as assignees of Edward Brown, a bankrupt, stating, in two counts, conversions by the defendants before and after the bankruptcy. The defendants pleaded not guilty, and denied the possession of the bankrupt and of the plaintiffs. It appears from the special case, that the bankrupt was a merchant at Birmingham, and the defendants, commission-agents having offices at Manchester and Leeds. The goods in question were ordered by Brown of the defendants, and were sent by them on the 20th of March, 1844, to Leech, Harrison, & Co., who were shipping-agents at Liverpool, employed by Brown to receive and forward the goods to Valparaiso; and, on the same day, the defendants wrote to Leech, Harrison, & Co., a letter, in which they say—"We have forwarded a parcel to your address, per Pickford & Co., carriers, which contains the pattern-cards of *four cases sent by them this evening, marked, [863 &c., for shipment to Valparaiso. You will please to see that the same is put on board with the goods, and properly directed, as Mr. Brown of Birmingham may direct the same to be shipped." On the 4th of April, Leech, Harrison, & Co., loaded the goods on board the Kestrel, a vessel bound for Valparaiso, informing the ship-owners that it was likely they would have to be relanded, and requesting them to have them kept at hand, till they should have an answer from their correspondents. Whilst the goods remained on board the Kestrel, Mr. Alison, a member of the firm of Alison, Cumberlege, & Co., having houses at London and Valparaiso, came down to Liverpool, and, seeing the goods, ordered them to be relanded for the purpose of having them repacked in eight cases instead of four. Leech, Harrison, & Co., accordingly relanded them on the 12th of April, sent them to the defendants at Manchester, and, on the same day, wrote to Brown to inform him of what they had done with the goods by Mr. Alison's orders; adding—"We presume you will give the necessary instructions about them, as we do not write to Messrs. Gibson & Co." On the same day,

the goods arrived at Manchester; and the defendants wrote to Leech, Harrison, & Co., inquiring whether they had not been sent in error, and requesting them to say what they were to do with them. On the 18th, Leech, Harrison, & Co. wrote, in answer, that the goods were forwarded by order of Brown, who would instruct the defendants respecting them. On the 26th of April, the price of the goods became payable to the defendants. On and before that day, and before the re-packing of the goods, Brown had suspended payment, and become insolvent, of which the defendants then heard. The case then states that sufficient conversion to maintain the action, is admitted.

Under these circumstances, the question is, whether the defendants had a right to retain the goods.

*864] *It was contended, on the argument, that the defendants had such right, as unpaid vendors in actual possession of the goods sold, the vendee being insolvent; or in respect of a right of stoppage *in transitu*. It was also contended, that the terms of payment for the goods not having been definitively settled, there was no complete contract, and that there had not been a binding acceptance of the goods.

On the part of the plaintiffs, it was insisted that the property and possession of the goods had vested absolutely in Brown, the vendee, before they were re-delivered to the defendants at Manchester; and that the re-delivery gave no new right to the defendants.

We are of opinion that the view of the case taken on the part of the plaintiffs is the correct one. With regard to the terms of the contract not having been completely agreed upon,—it appears that the price was agreed on, but that the mode and time of payment were not at first specified. But the omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances. And we think the evidence in this case shows that the parties intended to bind themselves by a contract of sale at the specified prices, leaving the mode of payment unexpressed, and to be determined by what was reasonable, or what should be agreed between them: so that, if the mode of payment had not been agreed on, the agreement of sale would be binding and complete. But, as the case states, that, on the 26th of April, the price of the goods became payable to the defendants, the inference is, that, before that day, the mode of payment, about *865] which very little *difference appears to have existed, had been settled by agreement; so that the contract, even if conditional at first, had become absolute.

With regard to the right of stoppage *in transitu*, it appears to us, that, though the defendants knew the goods were to be sent to Valpa-

raiso, and so informed Leech, Harrison, & Co., when they forwarded them to Liverpool, yet that Leech, Harrison, & Co., could not, simply on that information, forward the goods to Valparaiso, but that they held them subject to such orders as Brown might give as to forwarding them to Valparaiso, or elsewhere; and the *transitus* was consequently at an end as soon as the goods came to the hands of Leech, Harrison, & Co. But, when Leech, Harrison, & Co., by the order of Brown, re-landed the goods; and, by order of Alison, (who must be taken to have acted under the authority of Brown,) sent them to the defendants to be re-packed, the possession of the goods, as well as the property, vested in Brown, who, in causing them to be re-landed and sent to the defendants, dealt with the goods as owner; and this would certainly put an end to the *transitus*, even if it had not been determined, as we think it was, by the original delivery to Leech, Harrison, & Co.

The right which it was contended the defendants had, as vendors in the actual and lawful possession of the goods, on the insolvency of the vendee, cannot, we think, be sustained. The goods being sold on credit, and the complete property and possession having vested in Brown, they became his absolutely, without any lien or right of the vendors attaching to them, any more than on any other property of Brown; and their delivery to the defendants to be re-packed could not have the effect of creating a lien for the price, without an agreement to that effect. We therefore think there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

*PRYOE v. BELCHER.

[*866

In case against a returning officer for refusing to admit the plaintiff's vote at an election of a borough member, the first count—after stating the writ and precept for the election—alleged that the plaintiff was a burgess; that his name was on the register of voters; that he tendered his vote for one of the candidates, and answered in the affirmative the questions authorized by the 6 & 7 Vict. c. 18, s. 81, to be put by the returning officer, and was ready and offered to take the oath prescribed by s. 82; but that the defendant, being returning officer, *wrongfully, fraudulently, and wilfully intending to injure the plaintiff*, and to hinder and disappoint him of his privilege of and in the premises, refused to permit the plaintiff to give his vote, or allow the same to be entered and recorded, and that a burgess was elected, the plaintiff being so excluded from giving his vote.

The second count—after stating the writ and precept, and that the plaintiff was a burgess, and on the register—proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in the poll-books; that he was requested so to do; but that he, contriving and *wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff*, and to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books, to the end and intent aforesaid, refused so to receive the same, or to admit and allow the same to be so entered and recorded, to the end and intent aforesaid; but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of *votes tendered*, in the poll-books, and, at the close of the poll, refused to reckon, include, and cast up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate; *whereby the plaintiff was deprived of the benefit of his right to vote at that election.*

The third count—after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote—alleged that it was the duty of the defendant, as returning-officer, to enter the vote on the poll-books without entering into or allowing a scrutiny; but that the defendant, knowing the premises, but contriving and *wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify the plaintiff*, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, *wrongfully* ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and *wrongfully* took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at that election; *whereby* the plaintiff was delayed, hindered, and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that parliament, the plaintiff's vote being so hindered, &c.

Held, that, though the defendant, in refusing to admit the vote of the plaintiff, had mistaken his duty as returning officer, and had acted in contravention of the 82d section of the 6 & 7 Vict. c. 18, and may have thereby subjected himself to a criminal prosecution for the breach of a public duty, yet that the rejection of the vote could not be made the ground of a civil action at the suit of the person rejected, that person having, in fact, become disqualified to vote by reason of non-residence.

CASE, against the mayor of the borough of Abingdon, for refusing to admit the plaintiff to give his vote at an election of a member of parliament for that *borough,—for wrongfully entering his name as
*867] a "vote tendered,"—and for wrongfully holding a scrutiny. See the declaration, 3 Man. Gr. & Scott, p. 58.

Plea, not guilty "by statute."

The cause was tried before MAULE, J., at the Berks summer assizes in 1846. The facts were as follows:—

The name of the plaintiff being on the register as a person entitled to vote in the election of a member for the borough of Abingdon, he appeared at the place of election, and tendered his vote for General Caulfield, and offered to answer the questions, and to take the oath, authorized to be put and administered to voters, by the 81st section of the 6 & 7
*868] Vict. c. 18. (a) It being *however, proved before the defendant, who was mayor and returning-officer of the borough, that

(a) Which enacts, "that, in all elections whatever of a member or members to serve in parliament for any county, riding, parts, or division of a county, or for any city or borough, in England or Wales, or the town of Berwick-upon-Tweed, no inquiry shall be permitted, at the time of polling, as to the right of any person to vote, except only as follows, (that is to say,) that the returning-officer or his respective deputy shall, if required on behalf of any candidate, put to any voter, at the time of his tendering his vote, and not afterwards, the following questions, or either of them:—

"1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of — [or, for the — riding, parts, or — division of the county of —, or, for the city, or, borough, of —, as the case may be]?"

"2. Have you already voted, either here or elsewhere, at this election for the county of —, [or, for the — riding, parts, or — division of the county of —, or, for the city, or, borough, of —, as the case may be]?"

"And, if any person shall wilfully make a false answer to either of the questions aforesaid, he shall be deemed guilty of a misdemeanor, and shall and may be indicted, and punished accordingly; and the returning-officer, or his deputy, or a commissioner or commissioners to be for that purpose by law appointed, shall, if required on behalf of any candidate at the time aforesaid, administer an oath to any voter in the following form:—

"You do swear [or, affirm, as the case may be] that you are the same person whose name appears as A. B. on the register of voters now in force for the county of —, [or, for the — riding, parts, or — division of the county of —, or, for the city, or borough, of —,

the plaintiff had ceased to reside within the borough, and that, at the time of tendering his vote, he permanently resided, with his family, at the distance of more than seven miles therefrom, *viz.* at Gravesend, his vote was rejected, and his name entered in the poll-books as a vote tendered.

On the part of the plaintiff, it was insisted, that, although the plaintiff had no legal right to vote, the defendant was clearly guilty of a wilful violation of his duty, in taking upon himself, in defiance, of the 82d section of the act, (a) to hold a scrutiny; and, *consequently, [*869 that he was liable to an action at the suit of the party whose right he had so illegally obstructed.

For the defendant, it was submitted that the defendant was not liable, in the absence of evidence that he had been actuated by malicious and corrupt motives.

The learned judge told the jury that the rejection of the plaintiff's vote was in a certain sense *wilful*; that is, done intentionally; but that the question for them was, whether the defendant had acted maliciously, or merely under a misapprehension of his duty as returning officer.

The jury found that the plaintiff had no right to vote, and negatived malice in the defendant: and a verdict was, by the direction of the judge, entered for the defendant, with leave to the plaintiff to move to enter a verdict with nominal damages, in case the court should be of opinion that the action was maintainable, notwithstanding the absence of malice.

Whateley, in Michaelmas term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff, with 40s. damages. He referred to the 79th, 81st, 82d, 86th, 97th and 98th sections of the 6 & 7 Vict. c. 18; and also to *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 46, 1 Salk. 19, 3 Salk. 17, Ld. Holt, 524, 1 Smith's Leading Cases, 105; *Bernardiston v. Some*, 2 Lev. 114, 6 Howell's State Trials, 1063; *Harman v. Tappenden*, 1 East, 555; *Drewe v. Coulton*, 1 East, 563, n.; and Co-myn's Digest, tit. *Action upon Statutes*, (F).

**Talfourd*, Serjt., and *Maynard*, in Trinity term last, showed [*870

as the case may be,] and that you have not before voted, either here or elsewhere, at the present election for the county of—, [or, for the— riding, parts, or— division of the county of—, or, for the city, or borough of— *as the case may be.*] So help you God."

(a) Which enacts, "that, save as aforesaid, (s. 81,) it shall not be lawful to require any voter at any election whatever of a member or members to serve in parliament, to take any oath or affirmation, either in proof of his freehold, or of his residence, age, or other qualification or right to vote, any law or statute, local or general, to the contrary notwithstanding; nor to reject any vote tendered at such election by any person whose name shall be upon the register of voters in force for the time being, except by reason of its appearing to the returning-officer, or his deputy, upon putting such questions as aforesaid, or either of them, that the person so claiming the vote is not the same person whose name appears on such register as aforesaid, or that had previously voted at the same election, or except by reason of such person refusing to answer the said questions, or either of them, or to take the said oath, or make the said affirmation, or to take or make the oath or affirmation against bribery: and no scrutiny shall hereafter be allowed by or before any returning officer, with regard to any vote given or tendered at any such election, any law, statute, or usage to the contrary notwithstanding."

cause. There is no doubt that the defendant erred in rejecting the plaintiff's vote; for, by the 79th section of the 6 & 7 Vict. c. 18, the register is declared to be conclusive evidence of the continuance of the voter's qualification, by the 80th, the questions formerly put, and the oath administered, under the 2 W. 4, c. 45, ss. 58, 59, are dispensed with, and (by s. 81) no other inquiry can now be made, or oath administered, at the time of polling, except as to the voter's identity, and whether or not he has already voted; and the 82d section prohibits the holding a scrutiny. The defendant undoubtedly should have received the plaintiff's vote, leaving it to be subsequently dealt with by a committee of the House of Commons, under s. 98.(a) *But the ques-
 *871] tion is, whether the plaintiff can maintain this action without showing, in the language of his declaration, that he was entitled to vote, and that his right was *maliciously* obstructed by the defendant,—both of which the jury have negatived. It may be conceded, that, where a breach of an act of parliament has been committed, and a right has been thereby affected, case will lie. So, the obstruction or invasion of any legal right, or a possibility of injury to a title, affords ground of action, although no actual damage can be shown. *Weller v. Baker*, 2 Wils. 422; *Marzetti v. Williams*, 1 B. & Ad. 415; *Young v. Spencer*, 10 B. & C. 145,

(a) Which, — after reciting that, “in and by the said first-recited act, [2 W. 4, c. 45,] it is provided, (s. 60,) that, upon petition to the House of Commons, complaining of an undue election or return of any member or members to serve in parliament, any petitioner, or any person defending such election or return, shall be at liberty to impeach the correctness of the register of voters in force at the time of such election, by proving, that, in consequence of the decision of the barrister who shall have revised the lists of voters from which such register shall have been formed, the name of any person who voted at such election was improperly inserted or retained in such register, or the name of any person who tendered his vote at such election improperly omitted from such register, and the select committee appointed for the trial of such petition shall alter the poll taken at such election according to the truth of the case, and shall report their determination thereupon to the house, and the house shall thereupon carry such determination into effect, and the return shall be amended, or the election declared void, as the case may be, and the register corrected accordingly, or such other order shall be made as to the house shall seem proper; and that doubts have arisen as to the true intent and meaning of the said enactment with respect to the power and authority of any such committee to inquire into the validity or invalidity of the vote of any person being on the register of voters in force at the time of such election,”—declares and enacts “that it shall and may be lawful for any such committee to inquire into and decide upon the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have voted in such election, or, not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein, or expunged or omitted therefrom, by the express decision of the revising barrister who shall have revised the lists of voters from which such register shall have been formed, and also that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person, who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of legal incapacity at the time of his voting, under and by virtue of any statute now or hereafter to be in force, or on the ground of any other legal incapacity at the time of his voting, which may have arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register of voters in force at the time of such election shall have been formed; but that, except in such cases, or on such grounds as aforesaid, the register of voters in force at the time of such election, shall, as far as regards the proceedings before such committee, be final and conclusive, to all intents and purposes, as to the right to vote in such election of every person who shall be upon such register.”

5 M. & R. 47. In 1 Wms. Saunders, 346,(a) it is said, that "wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury." In the present *case, however, there is neither *damnum* nor *injuria*. No right [872 of the plaintiff has been infringed. Having ceased to reside within the borough, or within the prescribed limits, not only had he no right to vote, but he might have subjected himself to an indictment if he had voted. In *Ashby v. White*, three of the judges of the Court of King's Bench(a) held an action of this sort not to be maintainable. Lord HOLT, however, thought otherwise: and the House of Lords agreed with Lord HOLT, on the ground that the record there showed that the defendant had acted *maliciously*. All the cases are elaborately considered by ABBOTT, C. J., in *Cullen v. Morris*, 2 Stark. N. P. C. 577. Evidence was there offered for the purpose of showing *express* malice. In his summing up, the Lord Chief Justice says: "If the plaintiff had a right to vote, the question is, whether the action be maintainable under the circumstances of the case. On the part of the plaintiff, it has been contended that he has a maintainable right of action, without at all referring to the motives by which the defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant, it has been contended that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive; and that, if the party act honestly and uprightly, according to the best of his judgment, he is not amenable in an action for damages. I am of opinion that the law, as it has been stated by the counsel for the defendant, is correct. The returning officer is, to a certain degree, a ministerial one; but he is not so to all intents and *purposes; neither is he wholly a judicial officer: his [873 duties are neither entirely ministerial nor wholly judicial: they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes: the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action. It has been urged, that Lord HOLT,—who, with great honour to himself, once filled this seat,—intimated his opinion, that the mere refusal of the vote of a person entitled to vote, would give the party a right to sue the returning-officer. Whether he ever did say so or not, we do not certainly know; for, the reports of that case are very imperfect. No one entertains a greater veneration for that learned judge than I do; but, if he did so express himself, I am bound to deliver my opinion, that he was mistaken. The case alluded

(a) Notes to *Mellor v. Spateman*.

(b) Gould, Powys, and Powell, Ja.

to,—*Ashby v. White*,—had been tried by a jury; and, upon the face of the record, the defendant was charged with *malice*; and, when a writ of error was brought, the record itself was conclusive as to the malice of the defendant, since the court could look at nothing beyond the record. The next case which has been alluded to, is, that of *Grew v. Milward*, 2 Luders, 245; and there the declaration charged the defendant with having *wilfully and maliciously* refused the vote of the plaintiff; and there, the jury found a verdict for the plaintiff, with considerable damages, amounting to 800*l.*, from which it appears that the defendant *had* conducted himself very maliciously. A writ of error was then brought; but the averment of malice was upon the record, and ultimately the writ of error was abandoned. The next action was brought, not by the party *874] whose *vote had been refused, but by a candidate; and it was brought against the returning-officer for having refused votes tendered on behalf of the plaintiff, and having returned another candidate. That action was founded upon the statute of 7 & 8 Will. 3, c. 25; and that statute gives a right of action in those cases only where the act of the defendant is *wilful*. Sect. 6. A case afterwards came on to be tried before WILSON, J., on the Western circuit,—*Drewe v. Coulton*, 1 East, 863, n.—which had been brought by the plaintiff against the defendant for having refused to admit his vote.(a) It was admitted by the counsel for the plaintiff that the plaintiff was one of a class of persons who had not, for a length of time, been allowed to vote; and it was held that the action was not maintainable, because the defendant had done no more than that which his predecessors had done. If a vote be refused, with a view to prejudice either the party entitled to vote, or the candidate for whom he tenders his vote, the motive is an improper one, and an action is maintainable. The question for your consideration is, whether the refusal of the vote, in this instance, was founded on an improper motive on the part of the defendant. It is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty, acting under professional advice. If he intended to do prejudice either to the plaintiff or to the candidate for whom he meant to vote, the plaintiff is entitled to your verdict: if, on the other hand, he acted in the best way he could, according to his judgment, your verdict ought to be for the defendant." The reasoning there is sound and conclusive. *Pater v. Baker*, 3 Manning, Gr. & Scott, 831, is also a strong authority to show that an action of this sort is maintainable only on proof of *malice*. Here, as there, *875] the defendant was *acting in the *bona fide* performance of a public duty. In *Davis v. Black*, 1 Gale & D. 482, which was an action upon the case against a clergyman for refusing to marry the plaintiff, it was objected, on the part of the defendant, that the declara-

(a) The declaration alleged that the defendant obstructed and hindered the plaintiff from giving his vote.

tion did not disclose circumstances to show the proposed marriage, legal; and the court, concurring in the objection, held the action not maintainable. So, here, it was an essential averment in this declaration, that the plaintiff was entitled to vote in the election in question: and that the jury have negatived. [MAULE, J.—Suppose this plaintiff had been imprisoned by a wrong-doer, *per quod* he was prevented from voting at the election, could he in that case have maintained an action *in respect of the special damage?*] Clearly not. The voter sustains no injury. Not only was there no legal right, but the act of voting would have been, on the part of the plaintiff, an express contravention of the provisions of the act.

If the plaintiff has any remedy at all, it must be an action of *debt*, under the 97th section of the 6 & 7 Vict. c. 18, (a) in which case, as was held in *Tarr v. M'Gahey*, 7 C. & P. 380,—an action against an overseer for a penalty under the 76th section of the 2 W. 4, c. 45, the terms of which are identical with those of *6 & 7 Vict. c. 18, s. 97, [*876 for wilfully inserting in the list of voters the names of persons not entitled to vote,—it would not be necessary to show that the defendant acted maliciously or from any corrupt motive, but it would be sufficient to show that he acted *wilfully*. Case, however, lies only where it would have lain before the passing of the act.

Whateley, Kinglake, Serjt., and Phipson, in support of the rule. Formerly, the returning-officer had duties of a judicial as well as of a ministerial character, to perform: and it is expressly upon that ground that ABBOTT, C. J., in *Cullen v. Morris*, rests his exemption from liability, in the absence of proof of express malice. The same ground is taken by the majority of the court below, in *Ashby v. White*, 2 Ld. Raym. 954. But Lord HOLT, in giving his judgment, says, “Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute 2 Ric. 2, *de scandalis magnatum*, (b) but in consequence of law? For, the statute was made for the preservation of public peace, and that is the reason that no writ of error lies in the Exchequer Chamber by force of the statute of 27 Eliz. c. 8, in a judgment of the King's Bench on an action *de scandalis*; for, it is not included within the words of the statute; for, though the statute says such writ

(a) Which enacts, “that every sheriff, under-sheriff, clerk of the peace, town-clerk, secondary, returning-officer, clerk of the crown, postmaster, overseer, or other person or public officer required by this act to do any matter or thing, shall, for every wilful misfeasance, or wilful act of commission or omission contrary to this act, forfeit to any party aggrieved the penal sum of 100*l.*, or such less sum as the jury before whom may be tried any action to be brought for the recovery of the before-mentioned sum, shall consider just to be paid to such party, to be recovered by such party, with full costs of suit, by action for *debt* in any of her majesty's superior courts at Westminster: Provided always, that nothing herein contained shall be construed to supersede any remedy or action against any returning-officer, according to any law now in force.”

(b) 2 Ric. 2, c. 5; 12 Co. Rep. 134.

shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because it is an action of a far higher degree, being founded specially upon a statute.(a) If, then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible *when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute, too, in this case; for, by West. 1, 3 Edw. 1, c. 5, it is enacted, that, forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or menaces, shall disturb to make free election.(b) And this statute, as my Lord Coke observes, is only an enforcement of the common law; and, if the parliament thought the freedom of elections to be a matter of that consequence as to give their sanction to it, and to enact that they should be free, it is a violation of that statute to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable. And I am of opinion that this action on the case is a proper action. My brother POWELL, indeed, thinks that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff: but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for, a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As, in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action; for, it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage; for, it is an invasion of his property, and the other has no right to come there. And in these cases an action is brought, *vi et armis*. But, for invasion of *another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as, where a man has *retorna brevium*, he shall have an action against any one who enters, and invades his franchise, though he lose nothing by it. So, here, in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say that it will occasion multiplicity of actions; for, if men will multiply injuries, actions must be multiplied too; for, any man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So, if many persons receive a private injury by a public nuisance, every one shall have his action,—as is

(a) *Viscount Say and Seal v. Stephens*, Cro. Car. 142. Vide 1 Bla. Comm. 88.

(b) 2 Inst. 168, 169. The words "*ne per malicia*" are in 2 Inst., but are not in Ruffhead.

agreed in *Williams's case*, 5 Co. Rep. 72 b, and *Westbury and 1 well*, Co. Litt. 56 a. Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for, in that case, the law will not multiply actions. But it is otherwise when one man only is offended by that act; he shall have his action: as, if a man dig a pit in a common, every commoner shall have an action on the case, *per quod communiam suam in tam amplo modo habere non potuit*; for, every commoner has a separate right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the party shall be punished by indictment; (a) because the injury is general, and common to all that pass. But where the injury is particular and peculiar to every man, each man shall have his action." Since the passing of the reform and registration acts, the returning-officer is no longer a judicial, but a mere ministerial officer. It is his duty to record the vote, on the voter answering the *two questions prescribed by section 81 of the latter act; the one in [879 the affirmative, and the other in the negative; even though such answers be false to his own knowledge. [CRESSWELL, J.—There may be a duty to perform with respect to others, but not a duty to be performed to the party who tenders his vote.] This is not like the case of an action against the sheriff for a breach of duty, in permitting a prisoner arrested on *meane* process to escape—*Plank v. Anderson*, 5 T. R. 37; *Williams v. Mostyn*, 4 M. & W. 145,—or for falsely returning, that goods seized at the plaintiff's suit remain in his hands for want of buyers—*Wylie v. Birch*, 4 Q. B. 566. The invasion of the plaintiff's right, by wilfully refusing to record his vote, was an act from which the court would imply malice—*Crozer v. Pilling*, 4 B. & C. 26, 6 D. & R. 129; *Bromage v. Prosser*, 4 B. & C. 247, 6 D. & R. 296, and for which an action will lie, though no actual damage be shown to have resulted—*Weller v. Baker*, (b) *Marzetti v. Williams*, 1 B. & Ad. 410, 1 N. & M. 853; *Blofield v. Payne*, 4 B. & Ad. 410; for, wherever there is a breach of duty, the law will presume some damage—*Baker v. Green*, 2 Bing. 317, 9 J. B. Moore, 584; Buller's Nisi Prius, 64; Comyns Digest, tit. *Action on the Case for Misfeasance*, (A. 2.) In *Clifton v. Hooper*, 6 Q. B. 468, it was held, that, if the sheriff, having a writ of execution delivered to him, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution-creditor, though no actual pecuniary damage has arisen from the default. Lord DENMAN there says: "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against the party for some amount. There is no authority to the contrary. **Williams v. Mostyn* is expressly to the point, if what is said there be applied [880 to the case where the debtor might be arrested, but is not. The Court

(a) *Iverson v. Moore*, 1 Ld. Raym. 486.

(b) 2 Wills. 414, *The Tunbridge Wells Dippers' case*.

of Exchequer said there, that, if a debtor is arrested on final process, and escapes, there is a cause of action, though no pecuniary damage be shown; the creditor has a right to have the body in jail; and the escape of the debtor, for ever so short a time, is necessarily a damage to him; and the action for an escape lies." And WIGHTMAN, J., said: "The plaintiff here certainly lost the benefit of a right which he had to detain the body of the debtor. That right may have been of no value; but still there was some damage." In *Taylor v. Henniker*, 12 Ad. & E. 488, it was held, that, where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due: and it is no defence, that, after distress, and notice thereof, and before the sale, the landlord served a second notice on the tenant, stating the amount really due, and that the distress was taken for that amount only, and would be sold unless that amount was paid. That was a case of simple breach of duty, and no actual damage. This being the ordinary case of a ministerial officer, departing from a plain and strict duty imposed by act of parliament, the question of express malice does not arise.

The allegation in the declaration that the plaintiff was *entitled* to have his vote recorded at the election, does not necessarily import that he had an absolute and indefeasible right to vote. The language of the declaration is not to be understood in a sense larger than is necessary to support the action: *Heath v. Milward*, 2 N. C. 98, 2 Scott, 160. As against the present defendant, the declaration conclusively shows that the plaintiff was a person entitled to *vote. The declaration necessarily
*881] alleges the defendant to have acted maliciously: *Saxon v. Cas-
tle*, 6 Ad. & E. 652. *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

This was an action against the returning-officer of the borough of Abingdon, for refusing to admit the plaintiff to give his vote at an election of a member of parliament for the borough.

The plaintiff's name had been regularly placed on the register of voters for the borough; but he had ceased to reside there, and, at the time of the election, he resided with his family at Gravesend. He, however, tendered himself to give his vote at the election, insisting that, on his answering satisfactorily the questions which the returning-officer was authorized to put to him, and taking, if required, the oath authorized to be administered to a voter at an election of a member of parliament, he was entitled to have his name placed on the poll, and entered upon the final close of the poll. The returning-officer, however, rejected the vote; and for this rejection the action was brought.

Upon the trial, the jury,—having declared themselves satisfied that the plaintiff was not entitled to vote, and that the defendant was not actuated by any malicious motive, though the act of rejecting the vote was wilful, found a verdict, by the direction of the judge, for the defend-

ant. But leave was reserved to the plaintiff to have a verdict entered for him for 40s., if the court should be of opinion, that, on the facts proved, in the absence of malice, the action was maintainable.

A rule nisi having been granted, in conformity with the leave reserved, it was contended, on behalf of the *plaintiff, that, as the provisions of the statute 6 & 7 Vict. c. 18, s. 82, are express,—that [*882 it shall not be lawful to reject any vote tendered at any election of a member to serve in parliament by any person whose name shall be on the register of voters in force for the time being, except by reason of its appearing to the returning-officer, upon putting the questions mentioned in the statute, that the person so claiming to vote is not the same person whose name appears on such register, or that he has previously voted at the same election, or except by reason of such person refusing to answer the said questions, or either of them, or to take the said oath, or make the said affirmation, or to take or make the oath or affirmation against bribery,—it was therefore a clear violation of duty by the returning-officer to reject the vote; and that such an act was an injury to the voter's right, and a damage to him, for which an action lay, on the principles established by the cases of *Ashby v. White*, 2 Ld. Raym. 954, and *Clifton v. Hooper*, 6 Q. B. 468. The dictum of Lord DENMAN in the latter of those cases was particularly relied on, where it was said, that, when the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount.

On the part of the defendant, the 79th section of the same statute was relied on, by which it is provided that no person shall be entitled to vote at any future election for a member to serve in parliament for any borough, unless he shall ever since the 31st of July in the year in which his name was inserted in the register of voters then in force, have resided, and, at the time of voting, shall continue to reside, within the borough, or within the distance thereof required by the act to entitle him to be registered; and it was contended that the plaintiff, *in [*883 seeking to vote, contrary to the express provisions of the act of parliament, was himself endeavouring to commit a misdemeanor, for which he might be criminally responsible.

It was not denied, that the returning-officer, in refusing to admit the vote, had mistaken his duty, and acted in contravention of the 82d section of the act, and might have subjected himself to a criminal prosecution for the breach of a public duty: but it was insisted that the rejection of the vote, under these circumstances, could not be made the ground of a civil action at the suit of the person rejected.

It appears to us that this view of the case is correct. The object of the statutes 2 W. 4, c. 45, and 6 & 7 Vict. c. 18, in limiting the questions that should be put to a voter, appears to be, to prevent a waste of time, by going into intricate questions of law or fact, so that all who

were entitled to vote might have the opportunity of doing so within the limited time now allowed for the purpose.

This restricting of the inquiry to two simple questions, though highly convenient with reference to the general conduct of an election, was incidentally attended with this inconvenience, that it put it in the power of parties who were not entitled to vote, to have their names put upon the poll, and thereby to influence the election.

But it appears to us, that, although a party in the situation of the plaintiff, has the *power* in this way to compel the returning-officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the *right* to do so; that, in doing so, he is acting in direct contravention of the act of parliament, the terms of which are express, that he shall not be entitled to vote; and that the rejection of his vote cannot amount to a violation of any thing which the law can consider as his right.

*884] *The foundation of the plaintiff's action is, the injury to his right; but we are of opinion, for the reason above given, that he has no right, and consequently, that he has suffered no injury. The rule, therefore, for entering a verdict for the plaintiff, must be discharged.

This is to be considered as the judgment of my brothers MAULE and CRESSWELL and myself, the lord chief justice having been counsel in the case, and declining to interfere. Rule discharged.

KING v. NORMAN. July 3.

In debt, by A. against B. on a bond entered into jointly and severally by B. and C. to A., in the penal sum of 5000*l.*, the condition (set out on oyer) after reciting that C. had been appointed collector of taxes, and that A. had consented to become one of his sureties, was stated to be that B. and C. should keep harmless and indemnify A. from and against all costs, charges, &c., which he should incur in consequence of his becoming such surety. B. pleaded, that A. had not, at any time since the making of the bond, been in anywise damnified by reason or means of any matter, cause, or thing in the condition mentioned. To this plea A. replied, that C. continued collector until, &c.; that, during the said time that C. continued such collector, and after the making of the bond, &c., there came to the hands of C., as such collector, "divers large sums of money, amounting in the whole to a large sum of money, exceeding 500*l.*, *to wit*, 2006*l.* 7*s.* 10*d.*;" and that C. did not pay over the same, or any part thereof to the receiver-general: and A., for assigning a breach of the condition of the bond, said, that, by reason of such default, he was called upon by the receiver-general, and forced and compelled to pay, and did pay to the receiver-general a large sum of money, *to wit*, 500*l.*, parcel of the moneys so received by C. as such collector, &c. To this B. rejoined, that A. was not forced or obliged to pay the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as alleged:—

Held, that by this rejoinder, the receipt of 500*l.* by C. was not admitted; and that, in the absence of evidence to show that some money had been received by C., nominal damages only could be assessed on the breach assigned.

Held also, that the mere production of a judgment signed against A., under a judge's order, for 500*l.*, at the suit of the receiver-general, was not evidence of the amount of the damage sustained by A. in consequence of his suretiship.

DEBT upon a bond, in the penal sum of 5000*l.*, bearing date the 3d of October, 1845.

The defendant craved oyer of the bond and condition, *which were set out as follows:—"Know, all men, by these presents, that we, David Strachan, of, &c., and Joseph Norman, of, &c., (the defendant,) are jointly and severally held and firmly bound unto Thomas King, of, &c., (the plaintiff,) in the penal sum of 5000*l.*, of lawful money of Great Britain, to be paid to the said Thomas King, or to his certain attorney, executors, administrators, or assigns, for which payment, to be well and faithfully made, we jointly bind ourselves, our heirs, executors and administrators, and each of us severally, separately and apart from the other of us, bindeth himself, his heirs, executors, and administrators, firmly by these presents; Sealed with our seals: Dated, &c: Whereas the said David Strachan has been nominated and appointed a collector of the land, assessed, and property taxes, for the second part of Conduit Ward, in the parish St. George, Hanover Square, in the liberty of Westminster, in the county of Middlesex: And whereas the said Thomas King has consented to become one of the sureties for the said David Strachan, for the due payment to the receiver-general of taxes, of all such sum or sums of money as shall come to the hands of the said David Strachan, as such collector as aforesaid, and for the due demand by the said David Strachan, in pursuance of the acts of parliament under or by virtue of which the said several taxes are payable, of the several sums assessed, of the respective persons from whom the same are payable, and, in case of non-payment thereof, for the due enforcement of the powers of the said acts against such as shall make default: And whereas the said Thomas King consented to become such surety for the said David Strachan, on condition that the said David Strachan and Joseph Norman should enter into the above-written bond or obligation, subject to the condition hereafter contained: Now, the condition of the above-written bond or obligation is such, *that, if the said David Strachan and Joseph Norman, or one of them, their or one of their heirs, executors, or administrators, do and shall from time to time, and at all times hereafter, well and sufficiently save, defend, and keep harmless, and indemnify the said Thomas King, his heirs, executors, and administrators, from and against all loss, costs, charges, damages, and expenses which he the said Thomas King, his heirs, executors, or administrators, shall or may at any time or times hereafter incur, sustain, or be put unto by reason or in consequence of the said Thomas King becoming such surety as aforesaid,—then the above-written bond or obligation shall be void; otherwise, the same shall be and remain in full force and virtue:" which being read and heard, the defendant said that the plaintiff had not at any time since the making of the said writing obligatory, and condition thereof, hitherto, been in any wise damnified by reason or means of any matter, cause, or thing

in the said condition of the said writing obligatory mentioned—verification.

Replication, that the said David Strachan in the said writing obligatory, and in the said condition thereof, named, remained and continued such collector of the land, assessed, and property taxes, for the second part of Conduit Ward, &c., as in the said condition mentioned, for a long space of time, to wit, from the day of the making of the said writing obligatory, until and upon a certain other day subsequent thereto, to wit, until and upon the 5th of March, 1846; that, during the said time that the said David Strachan so remained and continued such collector as aforesaid, and after the making of the said writing obligatory, and of the said condition thereof, to wit, on the 8d of October, 1845, and on divers other days and times between that day and the said 5th of March, 1846, there came to the hands of the said David Strachan, as such collector as *aforesaid, divers large sums of money, amounting in
*887] the whole to a large sum of money, exceeding 500*l.*, to wit, the sum of 2006*l.* 7*s.* 10*d.*; and that the said David Strachan did not nor would duly pay to the receiver-general of taxes the said several sums of money so by him received as aforesaid, or any or either of them, or any part thereof, but therein wholly made default: and the plaintiff, for assigning a breach of the said condition of the said writing obligatory, according to the form of the statute in such case made, said, that, by means and by reason of such default and non-payment of the said David Strachan, as aforesaid, he, the plaintiff, afterwards, and before the commencement of the suit, to wit, on the 28th of May, 1846, was called upon by the said receiver-general of taxes to pay, and *was then forced and compelled to pay*, and did then pay, to the said receiver-general of taxes, a large sum of money, to wit, 500*l.*, parcel of the moneys so received by the said David Strachan as such collector as aforesaid, and he the plaintiff did thereby then incur and sustain loss and damage to a great amount, to wit, to the amount of 500*l.*, by reason and in consequence of his, the plaintiff's, having become such surety as in the said condition of the said writing obligatory mentioned; yet that the said David Strachan and the defendant had not, nor had either of them, paid the said sum of 500*l.*, or any part thereof, to the plaintiff, nor had they, nor had either of them, otherwise well and sufficiently saved, defended, kept harmless, and indemnified the plaintiff from or against such loss and damage as aforesaid; and the said sum of 500*l.* from thence hitherto had been, and still was, wholly due and unpaid to the plaintiff, contrary to the true intent and meaning of the said condition of the said writing obligatory—verification.

Rejoinder, that the plaintiff was not forced or compelled to pay to the
*888] said receiver-general of taxes the *said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as in the said replication alleged, and that the plain-

tiff of his own wrong paid the same—concluding to the country. Issue thereon.

At the trial, before WILLIAMS, J., at the sittings at Westminster after last Michaelmas term, there was no evidence given of the actual receipt of any money by Strachan, as collector; but it was admitted that he had not paid over any money to the receiver-general: and it was proved that the plaintiff, as his surety, had been called upon to pay 500*l.* claimed by the commissioners to be due from Strachan; and that, being sued, the plaintiff submitted to a judgment for that sum, which was signed against him under a judge's order.

On the part of the defendant, it was insisted, that, in the absence of proof of any specific sum having come to the hands of Strachan as collector, the plaintiff could only be entitled to nominal damages.

The learned judge, however, was of opinion that the receipt of 500*l.* by Strachan was admitted upon the record; and the damages were accordingly assessed at that sum.

Lush, in Hilary term last, obtained a rule nisi for a new trial, on the ground of misdirection.

May 27. *Montagu Chambers and Peacock*, in Trinity term last, showed cause. The receipt of 500*l.* by Strachan, as collector, is clearly admitted by the pleadings. The replication states, that, whilst Strachan was collector, and after the making of the bond, there came to his hands, as such collector, "divers large sums of money, amounting in the whole to a large sum of money, exceeding the sum of 500*l.*, to wit, the sum of 2006*l.* 7*s.* 10*d.*; and that, by reason of Strachan's default, in not paying [*889
*over to the receiver-general the moneys so received by him, "the plaintiff was called upon by the receiver-general to pay, and was then forced and compelled to pay, and did pay to the receiver-general, a large sum of money, to wit, 500*l.*" The replication, therefore, contains a positive and direct averment of the receipt by Strachan, as collector, of a sum exceeding 500*l.*, and an averment, under a *videlicet*, of the receipt of a sum of 2006*l.* 7*s.* 10*d.* The defendant, by his rejoinder, has severed that which is averred under a *videlicet* from that which is directly averred; for, he merely says "that the plaintiff was not forced or obliged to pay the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as alleged." The sum was clearly material, and might have been traversed. The general rule is thus laid down in 2 Wms. Saund. 291 d, citing *Symonds v. Knox*, 3 T. R. 68—"The want of a *videlicet* will, in some cases, make an averment material, that would not otherwise be so: as, if a thing which is not material is positively averred without a *videlicet*, though it was not necessary to be so, yet it is thereby made material, and must be proved. Therefore, where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet*; for, if he do

not, he will (a) be bound to prove the exact sum or day laid; it being a settled distinction, that, where any thing which is not material is laid under a *videlicet*, the party is not concluded by it, but he is so where there is no *videlicet*." In *Cooper v. Blick*, 2 Q. B. 915, the declaration stated, that, in consideration that the plaintiff would enter into the defendants' employ, to wit, in the capacity of editor of a newspaper, at *890] *and for a certain salary*, to wit, *at the rate of 400l. per annum*, *and would continue in their service till the expiration of three months after notice to determine the contract, the defendants promised to employ him in the said capacity, at the said salary, and to continue him in the service until the expiration of three months after notice, &c., or to pay him a proportionate part of the salary for three months; but that the plaintiff had been dismissed without notice, or the three months' salary. The defendants paid 37l. 10s. into court generally. On the trial, the plaintiff did not prove the contract for 400l., but relied on the payment into court as an admission of the amount. It was held, that the sum of 400l. specified as the rate of salary, not being material in itself, and being laid under a *videlicet*, the plaintiff would not be bound to prove it as laid, if non assumpsit had been pleaded; and therefore that the payment into court did not bind the defendants as an admission of that rate of salary: but (per PATTESON, J.) that the capacity in which the plaintiff engaged to serve *was* material, and, though laid under a *videlicet*, must, on non assumpsit, have been proved as laid, and *was* admitted by the payment into court. In delivering judgment, PATTESON, J., says: "There was no proof in this case of a specific contract to serve *as editor*; but it is contended that the payment into court admits the contract; and I agree that it does. The *videlicet*, as to that, has no operation; the averment must be material. But the amount of salary also is laid under a *videlicet*. As to the effect of that averment, the true test is, whether, if non assumpsit had been pleaded, the plaintiff would have been bound to prove the amount as laid. The payment admits a contract, but only to that extent to which the plaintiff is bound to prove it. The admission cannot tie the defendants where the plaintiff would be loose. The strongest case cited for the plaintiff, *891] *was, Preston v. Butcher*, 1 Stark. N. P. C. 3; but it does not go to the length to which the argument here would carry it. The ruling shows that the plaintiff there was bound, notwithstanding the *videlicet*, to prove a specific contract—an agreement for some given amount; but not that he was obliged to prove the precise amount alleged in the declaration. None of the cases show, that, in a declaration of this kind, a particular sum is material. In declaring on a bill of exchange, the sum is so; but there, as Mr. *Whitehurst* observed, it is matter of description. The amount of salary here was not so. As the plaintiff lays it under a *videlicet* for his own safety, he must take the

(a) In some cases.

consequence, namely, that the defendants are not bound to the allegation so made. Had the *videlicet* been omitted, the same test would have been applied: the plaintiff would have been bound to the precise statement, and the defendants' admission by payment into court would have bound them in the same manner. The sum is not in its nature material, and it is not made so by these pleadings." There are authorities to show that the allegation in question was material and traversable: *Tatem v. Perient*, Yelv. 195: [MAULE, J. There, the traverse was of a matter contained in the agreement. Here, it is not matter of description of the agreement, but an allegation of fact:] *Leake's case*, Dyer, 365. *Carrick v. Blagrove*, 1 Bro. & B. 531, 4 J. B. Moore, 803: [MAULE, J. There also the traverse was of the agreement:] *Smith v. Dixon*, 7 Ad. & E. 1. [COLTMAN, J. Would it have been a good rejoinder to deny that more than 500*l.* had been received? MAULE, J. As to any thing which the plaintiff can prove he was forced and compelled to pay, the rejoinder does not deny that that amount came to the hands of Strachan as collector. It is not the mere forcing that is put in *issue, but the forcing and the extent to which the plaintiff was forced. The receipt of 500*l.* is admitted only to the extent to which the plaintiff proves that he was compelled to pay.] The only fact in issue was, whether or not the receiver-general forced and compelled the plaintiff to pay the 500*l.* [MAULE, J. The question is, whether the judgment at the suit of the receiver-general is not *prima facie* evidence that the plaintiff *was* compelled to pay that sum.] It is submitted that the production of the judgment was sufficient evidence of that fact. [*892]

Channell, Serjt., and *Lush*, in support of the rule. The only admission on the record,—assuming that there is any,—is, that Strachan, as collector, has been guilty of *some* default. The plaintiff clearly was bound, in order to entitle himself to more than nominal damages, to go into evidence to show the amount. [MAULE, J. The plaintiff was bound, I apprehend, to show the coercion, and the amount. What you have to contend, is, that there could be no coercion, unless the party coercing had a right of action. It appears that the receiver-general has recovered a judgment against the plaintiff, upon the footing of a default on Strachan's part to the extent of 500*l.* Until it is shown that there was collusion, the question is whether the judgment is not *prima facie* evidence of coercion.] It is extremely doubtful whether there is any such admission on the record as suggested. The replication virtually incorporates and involves that which it is alleged on the part of the plaintiff is the material allegation, on which issue might have been taken: *Dunstan v. Tresider*, 5 T. R. 2. There was no proof in the cause that a single farthing ever came to the hands of Strachan as collector. He may have neglected to collect. All the evidence is, that, an action *having been brought against the present plaintiff by the receiver-general, [*893]

he, without any contest, without any proof of default on Strachan's part, submits to a judge's order for 500*l*. That surely cannot be held legitimate evidence of coercion. It might have been otherwise, if there had been a trial and a verdict.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court:—

This was an action of debt brought by King against Norman, on a bond bearing date the 3d of October, 1845. The bond was set out on oyer, and was a bond entered into jointly and severally by one David Strachan and the defendant Norman, to the plaintiff King, in the penal sum of 5000*l*. The condition was also set out on oyer, and recited that Strachan had been appointed collector of land, assessed, and property taxes, and that King had consented to become one of the sureties for Strachan; and the condition was, in substance, that Strachan and Norman should keep harmless and indemnify King from and against all costs, charges, and expenses which he should incur in consequence of his becoming such surety. The defendant then pleaded, that the plaintiff had not, at any time since the making of the said writing obligatory, been in any wise damnified by reason or means of any matter, cause, or thing in the condition of the said writing obligatory mentioned.

The plaintiff, by way of replication, stated that Strachan continued collector for a long time, to wit, from the making of the writing obligatory to a certain other day subsequent thereto, to wit, until and upon the 5th of March, 1846; and that, during the said time that Strachan continued such collector as aforesaid, and after the making of the said *894] writing obligatory, and the *condition thereof, to wit, on the 3d of October, 1835, and on divers other days and times between that day and the 5th of March, 1846, there came to the hands of Strachan, as such collector as aforesaid, divers large sums of money, amounting in the whole to a large sum of money, exceeding the sum of 500*l*., to wit, the sum of 2006*l*. 7*s*. 10*d*.; and that Strachan did not nor would duly pay to the receiver-general of taxes the said several sums of money so by him received as aforesaid, or any or either of them, or any part thereof, but therein made default: and the plaintiff, for assigning a breach of the condition of the said writing obligatory, said, that, by reason of such default, the plaintiff afterwards, to wit, on the 28th of May, 1846, was called upon by the receiver-general to pay, and was then forced and compelled to pay, and did then pay, to the receiver-general of taxes, a large sum of money, to wit, the sum of 500*l*., parcel of the moneys so received by Strachan as such collector as aforesaid, and did thereby then incur and sustain loss and damage to a great amount, to wit, to the amount of 500*l*. by reason and in consequence of his having become such surety as in the said condition mentioned; yet that Strachan and the defendant had not, nor had either of them, paid the said sum of 500*l*. to the plaintiff, nor kept him harmless or indemnified from and against such loss or damage as aforesaid, and the said sum of

500*l.* from thence hitherto had been, and still was, wholly due and unpaid to the plaintiff.

The defendant, by his rejoinder, said that the plaintiff was not forced or obliged to pay the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as alleged; on which issue was joined.

Upon the trial of the cause, no proof was given of the actual receipt of any money by Strachan, as collector: but it was admitted that he had not paid any over to the receiver-general; and it was proved that the *plaintiff had been called upon, as surety for Strachan, to pay the sum of 500*l.* claimed to be due from Strachan as collector; and that, having been sued in consequence, he had submitted to a judgment for 500*l.*, which was signed against him under a judge's order. [*895

It was contended, on behalf of the defendant, at the trial, that, in the absence of proof of any receipt of money by Strachan, as collector, the plaintiff was entitled to no more than nominal damages. The learned judge thought that the receipt of 500*l.* was admitted on the pleadings; and the damages were, in consequence, assessed at that amount.

A rule nisi for a new trial having been granted, the question was argued before my brothers MAULE and CRESSWELL and myself; and it was contended on behalf of the plaintiff,—as it had been at the trial,—that the receipt of 500*l.* by Strachan, as collector, was admitted, or, if not, that the judgment was evidence of the amount of damage sustained by the plaintiff.

It is an established rule of pleading, that, by pleading over, every traversable allegation which is not traversed is admitted, as is said in *Hudson v. Jones*, 1 Salk. 90; but what is not material or traversable, is not admitted or confessed, when it is alleged, and not traversed: *Rex v. The Bishop of Chester*, 2 Salk. 560, 1 Lord Raym. 292. In that case, Lord HOLT is reported in Lord Raymond, as regards this matter, to have said: "The case is this. The attorney-general declares that Queen Elizabeth, 14 February, 12th of her reign, was seised of this advowson in gross, and then presented Tymes, *prout*, by the enrolment of the letters-patent in Chancery, *nunc apud Westmonasterium, plenius apparet*. Now, though the defendant admits Charles the First to have been seised of this advowson in gross by descent, and consequently that Queen *Elizabeth was seised in gross of it at some time of her reign, yet he does not admit it at the precise time of the 14th of February, 12th of her reign, because the alleging of the time and day when Queen Elizabeth was seised in gross, is surplusage and immaterial; for, it is sufficient to allege general seisin in a *quare impedit*, in time of peace, in the reign of such a king. Then, though the defendant does not deny a thing, yet he admits by it only things

materially alleged, but he does not admit things immaterially alleged." In the present case, it was essential to the maintenance of the action, for the plaintiff to show that *some* money had been received by Strachan; but the amount he had received was not material; for, whether it was 5l. or 500l. which he had received, the bond was equally forfeited.

But it was contended, on behalf of the plaintiff, that, there being here a direct and positive allegation that there had come to the hands of Strachan a sum of money exceeding 500l., the defendant had a right to traverse the allegation to the extent to which it was made: and, to prove this, the cases of *Tatem v. Perient*, Yelv. 195, *Leake's case*, Dyer, 865, and *Smith v. Dixon*, 7 Ad. & E. 1, were relied on.

The general rule of pleading undoubtedly is, that a party shall not be allowed to take his traverse in such a form as to make matter which is immaterial, parcel of the issue: *Colborne v. Stockdale*, Stra. 493; *Doctrina Placitandi*, page 360; *Goram v. Sweeting*, 2 Wm. Saund. 204 a. But the cases cited on behalf of the plaintiff from Yelverton Dyer, and 7 Ad. & E., show, that, in certain cases in which the material and immaterial matters are mixed up in one combined and undivided allegation, the opposite party has been held to be entitled to traverse the whole compound allegation, in the terms in which it has been made. The *897] present case, however, does not, we think, *fall within the principle of those cases; the material part of the allegation, viz. that there came to the hands of Strachan a large sum of money, being perfectly distinct and separable from the immaterial part—that that sum exceeded 500l. If the immaterial words were struck out of this replication, the remainder would constitute a perfect allegation of every thing necessary to be alleged; and the case is like those of *Moore v. Boulcott*, 1 N. C. 323, 1 Scott, 122, and *Thurman v. Wild*, 11 Ad. & E. 458, 3 P. & D. 289, in which the traverse was held bad for including immaterial matters in the issue, although they had been directly averred in the adverse pleading. It is, however, not necessary to determine whether a traverse, in the terms of the allegation, could have been sustained on demurrer; for, no such traverse has been taken; and the question here is, what the defendant has admitted, by omitting to traverse the allegation: and according to the doctrine laid down by Lord HOLT, in *The King v. The Bishop of Chester*, above referred to, he is not to be considered as having admitted any thing but what is *materially* alleged. Even if the defendant had traversed the allegation in its terms, it would have been sufficient for the plaintiff to prove the substance of the issue; upon which the substantial question would have been whether any sum of money had come to Strachan or not; for, be it more or less, the action would be well maintainable; and it is impossible, we think, to contend that a party admits more by omitting to traverse an allegation, than the opposite party would have been compelled to prove, in order to sustain the issue, if it had been traversed.

On these grounds, we think that there is no admission on the record, that the sum of 500*l.* had come to the hands of Strachan.

*It was, secondly, contended, that the amount of the judgment was evidence of the amount which the plaintiff had been [898 obliged to pay, through the default of Strachan.

The judgment was, in this case, evidence that the plaintiff had been sued, and, coupled with proof, or (as in this case) an admission, of liability to some extent, might lead the jury to conclude that the plaintiff had been subjected to a *bond fide* pressure, by which he was forced and obliged to pay whatever he was legally liable to pay through Strachan's default. But, whether he was legally liable to the extent for which judgment was signed, is a matter which could only be collected by inference from the judgment: and, for such a purpose, the judgment could not be used, without holding that a stranger to a judgment—who has had no opportunity to cross-examine the witnesses, or to dispute the conclusions to be drawn from the evidence—can be bound by the verdict where the judgment is after verdict, or can be bound by an agreement made without his privity or intervention, between the parties to the judgment, where, as in the present case, it is a judgment founded on agreement. The law, we apprehend, is not so. The judgment cannot be used for such a purpose against one who is neither a party nor privy to it.

We think, therefore that the rule in this case ought to be made absolute. Rule absolute.

*PARSON v. SEXTON and Another. July 8. [899

A. addressed the following proposal to B.—"I do hereby agree to provide a *fourteen-horse engine*, and sixteen-horse boiler, with fittings, and every thing complete, for 260*l.*, and to deliver and erect the same at the mill of B., and to set the same to work."

To this B. replied—"In consideration of your supplying us with a *certain fourteen-horse engine, which our foreman has inspected*, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you and left with us, we agree to pay for the same 260*l.*—[Two instalments were then provided for, and the letter proceeded]—and will, on being satisfied with the work, as per your agreement, pay you the remainder within two months of its completion:"

Held, that B. bargained for and bought the specific engine, which was afterwards erected: and that, assuming there was a warranty as to its power, and that the warranty was broken, that was no answer to an action for the price, but only ground for a reduction, or the subject of a cross-action.

Held, also, that the stipulation as to deferring the payment of the last instalment until A.'s work was done to the satisfaction of B., referred to the work in erecting the engine, and not to the price of the engine itself.

A new trial was directed, on the ground that no question had been left to the jury as to whether that work was such as ought reasonably to have satisfied B.

ASSUMPSIT for goods sold and delivered, work and labour, money paid, money had and received, and money found due upon an account

stated. Pleas,—first, non-assumpsit; secondly, payment; thirdly, set-off for money paid, money due by virtue of an agreement, money had and received, and money due upon an account stated. Replication, traversing the alleged payment, and denying that the plaintiff was or is indebted.

The cause was tried before ERLE, J., at the sittings in Middlesex, after Trinity term, 1846. The facts were as follows: The plaintiff was an engineer, carrying on business in High Street, Lambeth. The defendants were millers at Uxbridge. The action was brought to recover the balance of the agreed price of a steam-engine and boiler, which the defendants had bought of the plaintiff under the following circumstances:—The engine had *originally been erected on the *900] premises of Messrs. Gresley, in Holywell Street, whence it had been removed by the plaintiff to his own premises in Lambeth. Some correspondence having taken place upon the subject between the plaintiff and the defendants,—in the course of which the diameter of the cylinder and of the fly-wheel, and the length of stroke were given,—the defendants sent their foreman and another engineer to inspect the engine, which they accordingly saw, and had every opportunity minutely to examine, but in detached pieces.

The contract finally entered into between the parties, was contained in two letters, dated respectively the 19th and 20th of August, 1845. The plaintiff's proposal, dated the 19th of August, was as follows:—

"I, James Parsons, do hereby agree to provide a fourteen-horse engine and sixteen-horse boiler, with fittings and every thing complete, for the sum of 260*l.*, and to deliver and erect the same at the mill of Messrs. Sexton & Co., and to set the same to work: to be complete in a workmanlike manner on or before the 1st of October next; and, if not complete by the 10th of October, to forfeit 10*s.* a day for every day's delay."

The defendants' acceptance of the proposal, bearing date the 20th of August, was in the following terms:—

"In consideration of your supplying us with a certain fourteen-horse engine which our foreman has inspected, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you and left with us, we agree to pay for the same 260*l.* [Two instalments were then provided for; and the letter proceeded]—and will on *being satisfied with the work, as per your agreement, pay you the remainder within two months of its completion."

The engine was sent down to the defendants' mill in September, 1845; but, in consequence, as the plaintiff alleged, of the defective preparations made by the defendants, who had agreed to do the necessary brick-work, the erection was not completed until January, 1846. It then not work-

ing to the defendants' satisfaction, some alterations were made by the plaintiff; but he could not succeed in making it do the work of a fourteen-horse engine. The defendants thereupon insisted upon their right to reject it.

The sum claimed by the particulars of demand, was, 856*l.* 19*s.* 6*d.* Credit was given for payments on account to the amount of 232*l.* 12*s.*, and a set-off of 7*l.* was admitted; leaving the balance sought to be recovered in this action, of 117*l.* 7*s.* 6*d.* The fittings formed no part of the original contract.

There was contradictory evidence as to the capacity of the engine; the plaintiff's witnesses affirming it to be a fourteen-horse engine; the defendants' witnesses, on the other hand, insisting that it was but a nine-horse engine,—though one of them admitted that it might be made to do the work of a fourteen-horse engine, for an expenditure of about 15*l.* or 20*l.*

It was contended on the part of the plaintiff, that this being a purchase of a specific chattel, after an opportunity of inspection, if there were any breach of warranty, (which, however, was denied,) it might be the subject of a cross action, but could not give the purchaser a right to repudiate the article.

The learned judge left it to the jury to say whether the engine delivered by the plaintiff was an engine of fourteen-horse power; telling them, that, if it was not of the description ordered, the defendants were at liberty *to reject it. He also observed, that, by the terms [902 of the contract, the last instalment was not payable until the defendants were satisfied with the work.

The jury returned a verdict for the defendants; and leave was reserved to the plaintiff to move to enter a verdict in his favour for 117*l.* 7*s.* 6*d.*, if the court should be of opinion that no warranty could be implied from the circumstances above disclosed.

Byles, Serjt., in Michaelmas term last, obtained a rule nisi to enter a verdict for the plaintiff pursuant to the leave reserved, or for a new trial, on the ground of misdirection. He relied on *Street v. Blay*, 2 B. & Ad. 456, *Thornton v. Place*, 1 M. & Rob. 296, and *Chanter v. Hopkins*, 4 M. & W. 399, and distinguished *Jones v. Bright*, 5 Bing. 583, 8 M. & P. 155.

Channell, Serjt., and *Bramwell*, in Easter term last, showed cause. It is sought, on the part of the plaintiff, to bring this case within the principle laid down in *Street v. Blay*, and *Chanter v. Hopkins*, on the ground that it was a purchase and sale of a specific chattel, and one which the plaintiff had previously inspected. Those cases, however, will not govern the present. The plaintiff contracted to provide a fourteen-horse engine, and a new sixteen-horse boiler,—the latter having no existence at the time of the contract, and the former being in an imperfect state. This is not, therefore, like the case of a horse, or other

chattel, which the buyer may at once take away: there could be no actual acceptance, until something had been done by the seller. [COLTMAN, J.—Is the acceptance material, where there is a specific agreement?

*903] CRESSWELL, J., referred to *Ollivant v. Bayley*, 5 Q. B. 288.(a)]

There, as in *Chanter v. Hopkins*, the article purchased had been the subject of a patent; it was a well known and ascertained thing; and the seller could not satisfy his contract by delivering any other than the patent article. Here, the plaintiff engages to erect the article which is the subject-matter of the contract, and to set the same to work as a fourteen-horse engine: and it was part and parcel of the contract, that the last instalment of the price was not to be paid until the defendants were satisfied that they had got what they bargained for, viz. a fourteen-horse engine. [CRESSWELL, J.—The defendants have got the thing they bought, and which was represented to them to be a fourteen-horse engine. If you can make out that the plaintiff was not entitled to payment until he erected the engine so as to make it work with a power equal to fourteen horses, your argument will be successful.] The first letter alone, it may be conceded, would only prove a contract for a specific engine, which had been subjected to the defendant's inspection. But, taking the two letters together, the contract clearly was not a contract for a specific chattel. [WILDE, C. J.—What was the use of describing the thing as a sixteen-horse engine if it was a contract for the specific article inspected and approved by the defendants' foreman?] Clearly none. In *Cave v. Coleman*, 3 M. & R. 2, it was held that a verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it the horse is perfectly quiet and free from vice," is a warranty. So, in *Shepherd v. Pybus*, 3 M. & G. 878, 4 Scott, N. R. 434, the defendant sold to the plaintiff a barge, which had been built by the defendant, and was then lying alongside his wharf (where the *plaintiff *904] had seen her,) not completely rigged; and it was held, that a warranty was implied that the barge was reasonably fit for use; and that, although the contract was in writing, evidence was admissible to show, that, in consequence of the defective construction of the barge, certain cement, which the plaintiff was conveying therein, was damaged, and the plaintiff incurred expense in rendering her fit for the purpose of his trade,—a purpose to which the defendant knew, at the time of the contract, she was intended to be applied. [CRESSWELL, J.—The Court of Exchequer in one case held a contract for the sale of a ship, satisfied by the transfer of a ship sticking upon a rock in the middle of the Atlantic.](b)

Byles, Serjt., and *Maynard*, in support of the rule. This clearly was not a case of warranty. It was a sale of a specific chattel. The words "a fourteen-horse engine," that appear in the contract, are merely de-

(a) S. C. 1 D. & Meriv. 373, per nom. *Ollivant v. Bayley*.

(b) Probably the case of *Barr v. Gibson*, 3 M. & W. 390.

scriptive. The contract is satisfied by the delivery of the very combination of metal that the defendants inspected. *Chanter v. Hopkins* and *Ollivant v. Bayley* conclusively show, that, where the purchase is of a specific and ascertained thing, no warranty can be implied. "The case," says Lord ABINGER, in *Chanter v. Hopkins*, "is that of an order for the purchase of a specific chattel, which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but, if it does not, he is not the less, on that account, bound to pay for it. The seller does not know it will not suit his purpose: and the contract is complied with in its terms." And, in *Ollivant v. Bayley*, it was held, that, where B. orders of A. a machine, previously known and ascertained, for which A. has a patent, it is no answer to an action for the price, that the machine does not answer the *pur- [905] pose specified in the patent, although it be not shown that the defendant has had previous opportunities of exercising his judgment as to the usefulness of the machine. [WILDE, C. J. Is not the contracting to supply a fourteen-horse engine, a warranty that it shall be an engine of that power? CRESSWELL, J. Suppose a dealer undertakes to furnish for my carriage a five-year old horse, and to put him in condition to do the ordinary work of an efficient carriage-horse; and I undertake to buy "the five-year old carriage-horse which my coachman saw this morning;" and the dealer sends me a horse some fifteen years old: does that man perform his contract?] *Caveat emptor*: the coachman should have looked at the horse's mouth. *Street v. Blay* is a distinct authority to show, that, in the case of a contract for a specific article, the breach of warranty is no answer to an action for the price. The learned judge here should have told the jury, that, even if they thought there was a breach of warranty, that afforded no defence, though it might be ground for a diminution of the price. The stipulation, however, for deferring the payment of the last instalment, in the event of the defendants' not being satisfied with the performance of the engine, expressly and pointedly excludes all notion of warranty. Besides, how is the plaintiff to get back an article that has become part and parcel of the defendants' freehold? *Allen v. Cameron*, 1 C. & M. 832, 8 Tyrwh. 907. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court:

The declaration in this case was for goods sold and delivered, work and labour, money paid, money had and received, and on an account stated.

*Pleas,—first, non assumpsit,—secondly, payment,—thirdly, [906] set-off for money paid, for money due by virtue of an agreement, for money had and received, and on an account stated.

Replication,—traverse of payment, and, to the set-off, never indebted.

At the trial, before ERLE, J., at the Middlesex sittings after Trinity term, 1846, it appeared that the action was brought for the balance al-

leged to be due on the sale of a steam-engine by the plaintiff to the defendants. The contract was contained in two letters that passed between the plaintiff and defendants, after some negotiation had taken place respecting the engine. [His lordship read the letters.]

The engine had belonged to the plaintiff's brother, who bought it of Messrs. Gresley, in Holywell Street, on whose premises it had been erected, pulled it down, and removed it in pieces to his own premises, where the foreman of the defendants saw and inspected it. It was sent to the premises of the defendants, and erected there, with a new boiler of sixteen-horse power. A good deal of delay occurred in erecting it; which the plaintiff attributed to the defective preparations made by the defendants, who were by the agreement to do the brick work necessary for the erection of the engine. It was erected and set to work in January, 1846, but did not work to the satisfaction of the defendants. Some alterations were made; but still there was a deficiency of power; and the engine did not do the work of a fourteen-horse engine. No fault was found with the boiler. The defendants then claimed a right to reject the engine: and, having paid a portion of the stipulated price, refused to pay the balance—117*l.* 7*s.* 6*d.*, and this action was brought to recover that sum.

It was proved that the fittings, &c., were no part of the engine.

*907] *For the defendants it was contended, that they had contracted for an engine of fourteen-horse power, and that the engine supplied not being such as was ordered, they were not bound to take or pay for it.

On the other hand, it was insisted, for the plaintiff, that the defendants bought the specific engine delivered, and therefore could not reject it on account of any alleged want of power; but, if they could establish a warranty, they might urge the breach of it in reduction of the price, or bring a cross-action.

The learned judge left it to the jury to say whether the engine delivered was of fourteen-horse power: and told them, that, if it was not of the description ordered, the defendants were at liberty to reject it: and he also observed, that, under the contract, the last instalment was not to be paid until the defendants were satisfied with the work.

The jury found for the defendants; and leave was reserved to the plaintiff to move to enter a verdict in his favour for 117*l.* 7*s.* 6*d.*

A rule nisi for entering a verdict for the plaintiff, or for a new trial, having been granted, the question was argued before us in Easter term, 1847, and the case stood over for further consideration.

The only difficulty in the case was, in ascertaining the true effect of the evidence; for, if the defendants bought a specific chattel, no doubt they were bound to receive and pay for it, although a warranty as to the power of the engine might have been introduced into the contract, which had not been fulfilled; for, it is now settled that the breach of a

warranty is no answer to an action for the price of a specific chattel sold, although it may be used in reduction of the price, or made the subject-matter of a cross-action.

In this case, after some correspondence about the engine, the defendants' foreman went over to inspect it: and, although it was not then put up, but was in *different pieces,—as it had been removed from [908] Gresley's premises, where it had been at work,—yet the whole of the engine was there, and the foreman had as good an opportunity of forming a judgment respecting it, as if it had been put together. Then, the plaintiff offered to provide a fourteen-horse engine, put it in repair, and find all fittings, &c., and a sixteen-horse boiler, for 260*l*. The defendants, in answer, agree to take on these terms, the fourteen-horse engine which their foreman had inspected. The evidence showed that the fittings were not part of the engine.

Upon this state of facts, we think that the defendants bargained for and bought the specific engine which was afterwards erected on their premises; and, assuming that there was a warranty as to its power, and that the warranty was broken, that was no answer to the action, according to *Street v. Blay*, 2 B. & Ald. 456. The case of *Chanter v. Hopkins*, 4 M. & W. 399, also establishes, that, where a known and ascertained article is ordered and sent, it must be paid for, although it do not answer the purpose for which it was ordered: and *Ollivant v. Bayley*, 5 Q. B. 288, 1 D. & Meriv. 878, is to the same effect. The defendants, then, could not reject the engine because it was not of fourteen-horse power; and the direction of the learned judge in that respect was wrong. But we think that the plaintiff cannot have a verdict for 117*l*. 7*s*. 6*d*. entered in his favour, for, the defendants may give evidence of the alleged warranty, and the breach of it, in reduction of the price agreed to be paid.

This would be sufficient to dispose of the rule, because the verdict may have proceeded on the misdirection already adverted to. But it was further contended, for the defendants, that, by the contract, they were not to pay the last instalment until the plaintiff's work was *done [909] to their satisfaction. It appears to us that this stipulation refers to the work of the plaintiff in *erecting* the engine, and not to the engine itself; and no question was left to the jury as to whether that work was such as ought reasonably to have satisfied the defendants; they relied on dissatisfaction with the engine, and not with the work of the plaintiff in erecting it.

It appears to us, therefore, that the verdict for the defendants cannot be sustained, on the ground that the time for payment of the last instalment had not arrived when the action was brought; and that the rule must be made absolute for a new trial.

Rule absolute for a new trial.

FAGAN v. HARRISON. July 8.

The plaintiff contracted to purchase from A. a ship then in course of building at Quebec, and to accept a bill for the price, on the vessel being completed according to the terms of the contract, and registered in his name. On the bill being presented for acceptance, the plaintiff declined to accept it, on the ground that A. had not duly performed his contract; whereupon the defendant undertook, that, if the plaintiff would accept the bill, he, the defendant, would abide by and perform the award of certain referees to be appointed to determine what should be done, in case, on the arrival of the ship at Dublin, the plaintiff should have any cause of complaint against A. in respect of his performance of the contract. On the ship's arrival, the referees awarded that a certain sum was payable to the plaintiff on account of deficiencies in the ship.

The court refused to allow the plaintiff, in declaring against the defendant upon his guarantee, to add to a count for non-performance of the award, a count alleging, that, in consideration of the plaintiff's accepting the bill, the defendant agreed to become personally responsible for the due performance of the contract by A.,—holding the joinder of such counts to be in apparent violation of the 5th rule of Hilary term, 4 W. 4.

ASSUMPSIT. The first count of the declaration stated, that, theretofore, and before the making of the promises by the defendant therein-after mentioned, to wit, on the 21st of February, 1845, an agreement *910] in *writing was made and entered into between T. C. Lee, therein described as of Quebec, in the province of Lower Canada, and the plaintiff, whereby the said T. C. Lee agreed to sell, and the plaintiff agreed to buy, a new ship or vessel then building at Quebec, and not then launched, to be of the registered tonnage (old measure) of about 560 tons; which said vessel was in a great state of forwardness, and would be launched first open water, and got ready for sea, and fitted with all despatch, so as to sail amongst the first ships from Quebec; the said ship to be sold with her hull, masts, and spars, standing and running rigging, sails, anchors, and chains all complete, as per inventory annexed to the said agreement, and ready for sea, deliverable to the plaintiff at Quebec the day the said ship would be ready to commence taking in cargo after she was launched; from which day the plaintiff's ownership was to commence, but prior to which the ship was to be at the risk of the said T. C. Lee: that T. C. Lee thereby engaged that the said ship would be finished in a complete and workmanlike manner, and be furnished with the certificate to that effect from Lloyds' surveyor, W. Jameson; that her anchors and chains should be new, and of the size and weight required for her size to pass Lloyds' surveyor there for classification, except that her chains should be of the length of ninety fathoms each, as per inventory, and should be the same as the ship *Rose*; that the said ship should have at least one full suit of sails, all new, and that her rigging should be all new, and of the sizes required for a ship of her tonnage; masts and spars to be all good and sufficient, and to have all the masts' heads of sufficient length; that the said ship should be copper-fastened, like the *Rose*, except the centre rows, which were iron, and in consideration of which T. C. Lee agreed to allow the plaintiff an abatement off the price of the said ship to the extent of 25*l*.; that the

*iron-work should be all of a proper size, and sufficient, for both hull and spars; that the said ship should have a sufficient windlass, on the principle of Tyzacks & Dobson's patent; and also to have three boats, new and good, and of sufficient size for the vessel; that all the carpenters' and joiners' work should be well and thoroughly finished, and the whole ship finished and put out of hand in a thorough workman-like manner: and the plaintiff thereby agreed to pay the said T. C. Lee for the said ship 8*l.* per ton, on the old measurement tonnage, payable by his acceptance of T. C. Lee's draft at six months from the date when the ship should be ready to take in cargo, which draft the plaintiff thereby bound himself to accept on receipt of such advice of her being launched and ready to take in, as would enable him to protect himself by insurance; which advice the said T. C. Lee thereby bound himself to give him, at the same time that he notified the drawing of the said bill: the said ship was to be registered in the name of the plaintiff, and the register was to be taken out accordingly: the said ship was to be fitted similarly to the *Rose*, and in accordance with the inventory annexed to the said agreement: the said ship was to be delivered at Quebec by the said T. C. Lee, who would charge on the amount thereof the rate of commission usual at that place: in case of the said ship not being according to the said T. C. Lee's representation, and the said written agreement, and that the said ship should, on her arrival in Dublin, exhibit any defect which should be declared as such by any two competent persons, the said T. C. Lee thereby agreed to put it to rights, at his own expense, on her second voyage: and, lastly, it was further agreed, that in lieu of the 25*l.* as before stated to be abated by the said T. C. Lee, the plaintiff preferred to leave it to the said T. C. Lee's generosity and liberality to give him an equivalent in *workmanship, or any other manner, in lieu thereof. The declaration then averred, that, the said agreement being so made as aforesaid, and the said ship being built and ready to receive cargo, the said T. C. Lee, to wit, on the 7th of May, 1845, drew upon the plaintiff a certain bill of exchange for payment of the said price so agreed to be given for the said ship or vessel, to wit, the sum of 4389*l.* 7*s.* 3*d.*, payable six months after the date thereof: that, the said ship or vessel not having been registered in the name of the plaintiff, and the register thereof not having been taken out accordingly; but, on the contrary thereof, the said ship or vessel having been registered in the name of the said T. C. Lee; and the said ship not having been well built, in a complete and workman-like manner; and the said agreement not having been, in these and in other respects, fulfilled or performed by the said T. C. Lee, according to the terms, true intent, and meaning thereof; and the plaintiff having, by reason thereof, refused to accept the said bill of exchange so drawn upon him as aforesaid; thereupon, afterwards, to wit, on the 19th of June 1845, in consideration that the plaintiff, at the request of

the defendant, would accept the said bill of exchange so drawn by the said T. C. Lee upon the plaintiff as aforesaid, and would promise and agree on his part to abide by, perform, and keep the award and determination of one E. Chaloner and one Q. Fleming, who should be appointed by and on behalf of the plaintiff and of the defendant to decide and determine what ought to be done, in case, upon the said ship's arrival at Dublin, the plaintiff should have any cause of complaint against the said T. C. Lee in respect of the said agreement, and to adjust all differences between the plaintiff and the said T. C. Lee in respect of the said agreement,—with power to the said E. Chaloner and Q. Fleming to *913] call in two competent surveyors to *survey and report upon the alleged defects and deficiencies of the said vessel, and to estimate the amount thereof; the defendant then promised the plaintiff that he would be responsible to the plaintiff for whatever the said E. Chaloner and Q. Fleming should award and determine in that behalf, and would fulfil, abide by, and perform the award of the said E. Chaloner and Q. Fleming in the premises. Averment, that the plaintiff, confiding in the said promise and undertaking of the defendant, afterwards, to wit, on the day and year last aforesaid, did accept the said bill of exchange so drawn by the said T. C. Lee as aforesaid, and afterwards, at the maturity thereof, duly paid the same: that the said ship or vessel having arrived at Dublin, and the said E. Chaloner and Q. Fleming having taken upon themselves the burden of determining and adjusting the said matters so referred to them, did, to wit, on the 6th of April, 1846, by a certain note in writing, award and adjudge that the sum of 376*l.* should be paid to the plaintiff by the defendant on behalf of the said T. C. Lee, with interest from the date of his the plaintiff's acceptance for the ship falling due, and that the said award should be paid on presentation thereof: that the said award was afterwards, to wit, on the day and year last aforesaid, duly presented to the defendant, and he then had notice thereof; yet that the defendant had not paid to the plaintiff the said sum of 376*l.*, or any part thereof.

The second count stated, that, the said agreement in writing between the said T. C. Lee and the plaintiff in the first count thereinbefore mentioned, having been made and entered into as aforesaid, and the said ship or vessel therein mentioned being built and ready to receive cargo, the said T. C. Lee, to wit, on the 7th of May, 1845, drew upon the plaintiff a certain bill of exchange for payment of the said price so *914] agreed to be *given for the said ship or vessel, to wit, the sum of 4389*l.* 7*s.* 3*d.*, payable six months after the date thereof, and the said ship or vessel not being then built and finished in a complete and workman-like manner, and the said ship or vessel not having been then registered in the name of the plaintiff, according to the terms, true intent, and meaning of the said agreement, the plaintiff refused to accept the said bill of exchange so drawn upon him as aforesaid; th

thereupon, afterwards, to wit, on the 19th of June, 1845, in consideration that the plaintiff, at the request of the defendant, would accept the said bill of exchange so drawn by the said T. C. Lee upon the plaintiff as aforesaid, and would forthwith return the same, accepted by the plaintiff, to the defendant, he the defendant then agreed with the plaintiff to become personally responsible to the plaintiff for the due fulfilment by the said T. C. Lee of the conditions of the said agreement so entered into by the said T. C. Lee with the plaintiff as aforesaid. Averment, that the plaintiff, confiding in the undertaking of the defendant afterwards, to wit, on the day and year last aforesaid, did accept the said bill of exchange so drawn by the said T. C. Lee as aforesaid, and did forthwith return the same, accepted by the plaintiff, to the defendant: and that, although the said ship or vessel was built and finished, and delivered over to the plaintiff, yet that the said T. C. Lee had not fulfilled the conditions of the said agreement so entered into by him as aforesaid, but had broken the same, in this, to wit, that the said ship was not finished in a complete and workmanlike manner, but, on the contrary thereof, the said ship was finished in an incomplete and unworkman-like manner; and that the said T. C. Lee had not fulfilled the conditions of the said agreement, in this, to wit, that, although he delivered to the plaintiff with the said ship, certain anchors and *chains for the said ship, yet that the same were not new, or of [*915 the size or weight required for the size of the said ship to pass Lloyds' surveyor at Quebec for classification, nor were the said chains of the length of ninety fathoms,—of all which the defendant and the said T. C. Lee, afterwards, to wit, on the 8th of April, 1846, had notice: yet that neither the defendant nor the said T. C. Lee had at any time made satisfaction to the plaintiff for the non-fulfilment of the said conditions, or any of them, but had respectively refused so to do, and the plaintiff was and remained wholly unsatisfied in respect thereof, &c.

V. WILLIAMS, J., on the 25th of February last, upon a summons taken out for that purpose, ordered that the second count should be struck out, with costs, on the ground that the two counts were founded upon the same identical subject-matter of complaint, and were in apparent violation of the 5th rule of Hilary term, 4 W. 4.

April 20. *Byles*, Serjt., in Easter term last, upon the citation of *Gilbert v. Hales*, 2 D. & L. 227, and *Cahoon v. Burford*, 13 M. & W. 136, 2 D. & L. 234, obtained a rule nisi to rescind that order.

May 7. *J. Wilde*, on a subsequent day in the same term, showed cause. The two counts are founded upon the same subject-matter of complaint, and are in direct violation of the rules of Hilary term 4 W. 4.(a) There was but one agreement, and but one acceptance. The only difference between the two counts is, that, in the first, it is alleged that the defendant agreed to become responsible for whatever the referees

(a) See the rules, ante, pp. 772, 773.

*916] might award for *the breach of the agreement; and, in the second, that he agreed to become personally responsible to the plaintiff for the due fulfilment by Lee of the conditions of his agreement. It is impossible to look at the two counts without perceiving that they are founded on the same contract. In *Jenkins v. Treloar*, 1 M. & W. 16, Tyrwh. & G. 316, a declaration contained one count claiming a fee or reward, in the name of metage, on coals imported into the port of Truro, alleged to be due to the plaintiff as lessee, under the corporation of Truro, of an ancient office of meter, to which the fee was stated to be incident, and another count claiming the same sum as a port-duty; and it was held that these counts were only different statements of the same subject-matter of complaint, within the meaning of the rule, and that one of them must be struck out, unless the judge at chambers, on a reference back to him, should exercise the discretion given by the rule, of allowing both counts, on the undertaking of the plaintiff to give evidence of substantially different claims. Lord ABINGER there says: "I own, if I thought the judge at chambers had a discretion, or that the rules gave us a discretion, I should be disposed to allow both counts in this case. But, after a good deal of consideration, I think the rules are peremptory upon us, and compel us to make this rule absolute. This is the same thing claimed on different contracts: the same sum proved by the same evidence." So, here, the two counts involve precisely the same subject-matter of complaint, viz., the liability to make good the defects in the ship. In *Cholmondeley v. Payne*, 3 N. C. 708, 4 Scott, 418, two counts upon the same contract, the one alleging the defendant to be liable jointly with another, the other, alone, were disallowed, and

*917] TINDAL, C. J., said: "Upon reading the first *two counts of this declaration, I am unable to discover that they relate to two distinct subject-matters; and, therefore, I think we must abide by the rule, the terms of which are very express. The only way in which the plaintiff can have the benefit of the two counts, is, by referring the matter back to the judge at chambers, to make the endorsement on the summons, or give the certificate on the face of his order, under the 6th and 7th clauses of the rules of pleading referred to, according to the course adopted by the Court of Exchequer in *Jenkins v. Treloar*." [CRESSWELL, J. Suppose, on the arrival of this ship at Dublin, she were examined, and her defects adjudged to amount to a certain sum; could not that be recovered under the first count?] Clearly it might. [CRESSWELL, J. According to the rule, "Counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed."] If this case is not within the prohibition of the rule, it is extremely difficult to imagine one that would be.

Byles, Serjt., in support of his rule. In *Gilbert v. Hales*, the declaration contained twenty-five counts: the first fifteen were on bills of ex

change drawn at Paris: the next five, which related to the same bills, were special counts founded on the law of France; and the last five were on a special agreement to pay the bills, in consideration of the plaintiff's procuring their discount. The Court of Exchequer refused to strike out the last set of counts, as being in apparent violation of the 4th rule of Hilary term, 4 W. 4. In support of the rule, it was suggested that the true test is, to consider whether the plaintiff could recover under the last set of counts any damage to which he would not be entitled under the other counts. But POLLOCK, C. B., said: "I do not *think that the true criterion in these cases is that suggested by the defendant's counsel. In the example given in the rule of [918 court, freight on a charter-party is allowed to be joined with a count for freight, *pro ratâ itineris*, and such two counts might fairly be joined with a third, on a special agreement to pay for the goods carried. Each of those counts would require different pleadings and different evidence to support it. So, in the present case, the three sets of counts are founded on separate and distinct rights. The first, on the *lex mercatoria*; the second, on the law of France, and the third, on the special agreement." And ALDERSON, B., said: "These counts certainly do not, *on the face of them*, appear to be in violation of the rule; although it may probably turn out that there was, in point of fact, but one contract between the parties." That case was confirmed by *Cahoon v. Burford*, where a count for money had and received was allowed, with a special count for the breach of warranty of a horse, the breach alleged being, that "the horse became and was of no value to the plaintiff, and that the plaintiff had been put to expense in and about the feeding, keeping, and taking care of the said horse, and returning the same to the defendant. ALDERSON, B., there says: "The question is, does it appear *on the face of the second count*, that it is for the same cause of action as the first? It certainly does not; and it is plain that the two counts are not in respect of the same cause of action; since the first is for the recovery of damages for the breach of a warranty of a horse; but the second is, to recover money paid to the defendant, on the ground that it was paid on a consideration which has failed. That count is for the price of the horse; whereas, the preceding count is for unascertained damage, the true measure of which may, in some degree, be the price of the horse." In both those cases it was quite manifest that there was but one contract. In **Vaughan v. Glenn*, 5 M. & W. 577, [919 8 Dowl. P. C. 396, the first count was on a charter-party, whereby the defendant agreed that the ship should sail to Honduras, and there take on board a cargo of mahogany, &c., and proceed to London or Liverpool, and deliver the same, on payment of freight,—assigning for breach, that part of the cargo was not taken on board, or delivered, according to the agreement: the second count alleged, that, in consideration that the plaintiff had caused certain goods to be taken to

and loaded on board the defendant's vessel, in the bay of Honduras, to be carried to England, &c., the defendant promised that due and proper care should be taken of the goods, until they were loaded on board the vessel,—assigning for breach, that, whilst the goods were in the defendant's custody, to be loaded on board the vessel, they were lost: and it was held, that these counts contained distinct subject-matters of complaint. Here, the plaintiff might be unable at the trial to prove the award, and then, if he had not the second count to fall back upon, he would fail. On the other hand, if he relied upon the contract in the second count, and failed in proof of that, he could not amend by introducing the award. The language of the 5th rule is, that “several counts shall not be allowed, unless a distinct subject-matter of complaint [not, ‘a distinct contract,’] is intended to be established in respect of each.” [WILDE, C. J. The examples given show, beyond a question, that “subject-matter” means “contract.”] The rule must mean the same, whether applied to counts, in which the subject-matters may be contracts, or to pleas or avowries, where they are not. [WILDE, C. J. In *James v. Bourne*, 4 N. C. 708, 6 Scott, 231, 6 Dowl. P. C. 608, in assumpsit against carriers for the non-delivery of goods, the declaration contained *920] two counts,—*the first, on a contract for the conveyance of the goods from the port of loading to the port of discharge,—the second, on a contract to take care of the same goods at the wharf where they should be landed, and to convey them to the plaintiffs' place of business, for other reward to the defendants in that behalf; and the court refused to strike out one of the counts, upon a suggestion that the joining them was in apparent violation of the rule in question. TINDAL, C. J., there says: “Undoubtedly, if the words of the 5th rule be taken in their more general sense, the introduction of the second count here would be a violation of it, *the subject-matter of complaint*, viz. the loss of the goods, being the same in both counts. But, construing the rule by the examples that are given, I think it is perfectly clear, that, if the two counts disclose *several and distinct contracts*, the rule will not be violated by suffering them to remain.” V. WILLIAMS, J. I must confess I have great difficulty in saying that this is any other than a variation in stating one and the same contract in both counts.]

Cur. adv. vult.

WILDE, C. J., now said: We are all of opinion that the order of the learned judge in this case was perfectly correct, and therefore that the rule should be discharged; and, being an appeal against a decision at chambers, it must be discharged, with costs.

Rule discharged with costs.

AN

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II. *Proof of Retainer.*

1. In assumpsit against a joint-stock company, (sued in the name of their secretary,) the first count of the declaration alleged, that, in consideration that the plaintiff had agreed to become the *permanent* attorney and solicitor of the company, and to act as such, for reasonable reward, &c., the company *promised the plaintiff to retain and employ him as such permanent attorney, &c.*; and that, in pursuance of the agreement, the company did in fact retain and employ him, and the plaintiff acted, and had always from thence been ready and willing to act, as the permanent attorney of the company; and alleged, for breach, that the company wrongfully, and without any just or reasonable cause for so

doing, discharged the plaintiff from being or acting as such attorney, &c.—*Held*, that this count was not supported by proof of a resolution of the directors, that the plaintiff "be appointed *permanent* solicitor to the institution," the word *permanent* denoting, in such resolution, no more than a *general* employment as contradistinguished from an *occasional* or *special* employment. *Elderton v. Emmens.* Page 479.

2. The second count alleged that it was agreed between the plaintiff and the company, that, from a certain day, the plaintiff, as the attorney of the company, should receive and accept a salary of 100*l. per annum*, in lieu of rendering an annual bill of costs for the business transacted by him for the company; and averred that, the said agreement being so made, in consideration that the plaintiff had, at the request of the company, promised the company to perform and fulfil the same in all things on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, *and to retain and employ him as such attorney of the company, on the terms aforesaid*; and assigned for breach, that the company did not continue to employ the plaintiff as such attorney, but wrongfully, and without reasonable cause, dismissed him from such employment, &c.—*Held*, (but reversed in the Exchequer Chamber,) that the agreement did not necessarily imply a promise by the company to employ the plaintiff; and that, the consideration being exhausted by the mutual promises, there was nothing to sustain the latter branch of the company's promise, and that the count was bad in arrest of judgment. 479.

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Undisclosed Principal.

A. bought at auction three lots of one hundred railway shares each, one of the conditions of sale being, "the balance of the purchase-money shall be paid at the office of the auctioneers on the day following the sale, except in cases where any special transfers are required, and to such, the utmost expedition will be given." After the sale, A. received the three hundred shares, together with a bill of parcels describing the transaction as a sale of "three hundred shares," and paid the price. The name of the owner of the shares was not disclosed at the time of the sale; but, upon A. applying for a transfer,—the constitution of the company requiring a transfer by deed,—the auctioneers informed him that they were only agents in the transaction, and referred him to B., as their principal, and as the party who, alone, could procure the transfer to be executed

In an action against the auctioneers for not transferring:—*Held*, first, that, inasmuch as they had not disclosed their principal at the time of the sale, they were personally liable,—secondly, that the bill of parcels was evidence of an entire contract for the sale of three hundred shares,—thirdly, that, by referring A. to B., the defendants discharged A. from tendering a transfer to them. *Franklyn v. Lamond*. Page 637

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1. Under the 7 G. 4, c. 46, s. 13, a party moving for a *scire facias* in order to have execution against former members of a banking company, on a judgment against the registered officer, must show that he has made substantial and *bonâ fide* endeavours to obtain an available execution against the members for the time being; and the court will decide, on the motion, whether sufficient diligence has been used in the particular case. *Field v. Mackenzie*. 705
2. It is not necessary that execution should first be issued against all the members for the time being.—*WILDE, C. J., dubitante*. *Ibid*.
3. Slight evidence that the parties sought to be charged as such, were members at the time of the contract, will suffice to induce the court to grant a rule for a *scire facias* against them, in the absence of affidavits on their part negating the facts constituting their liability. *Ibid*.
4. The court refused to allow the rule nisi to be drawn up for an earlier day than by the ordinary practice it would be drawn up, upon a suggestion that the period limited by the statute for proceedings against former members had nearly expired. *Ibid*.
5. The court refused to set aside a rule which had been made absolute for a *scire facias* against former members of a banking co-partnership, under the 7 G. 4, c. 46, s. 13, on the ground that the party by whom the rule had been obtained had omitted to disclose the fact of his holding a collateral security upon property belonging to the bank, which, it was believed, might, by management and care, be made productive to an amount exceeding the judgment debt. *Field v. Mackenzie*. Page 725

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The drawer of a bill of exchange, who has paid the amount to an endorsee after a *fiat* in bankruptcy issued against the acceptor, may sue the latter upon the bill, before he has obtained his certificate, notwithstanding the endorsee has proved under the *fiat*. *Walker v. Pilbeam*. 229

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1. To debt on a bond bearing date on a day more than twenty years before the commencement of the action, the defendant pleaded that the debt and cause of action in the declaration mentioned, did not accrue at any time within twenty years next before the commencement of the suit. Replication, that the debt and cause of action *did* so accrue. At the trial, the bond was produced, and appeared to be a *post obit* bond; and it was proved that the party upon whose death the sum secured was made payable, died within twenty years:—*Held*, that the plaintiff was entitled to the verdict. *Tuckey v. Hawkins*. 655
2. *Semble*, that the replication would have been bad on special demurrer. *Ibid*.

CASE.

I. *For Misfeasance.*

In case against a returning officer for refusing to admit the plaintiff's vote at an election of a borough member, the first count—after stating the writ and precept for the election—alleged that the plaintiff was a burgess; that his name was on the register of voters; that he tendered his vote for one of the candidates, and answered in the affirmative the questions authorized by the 6 & 7 Vict. c. 18, s. 81, to be put by the returning officer, and was ready and offered to take the oath prescribed by s. 82; but that the defendant, being returning officer, *wrongfully, fraudulently, and wilfully intending to injure the plaintiff*, and to hinder and disappoint him of his privilege of and in the premises, refused to permit the plaintiff to give his

vote, or allow the same to be entered and recorded, and that a burgess was elected, the plaintiff being so excluded from giving his vote. *Pryce v. Belcher*. Page 866

The second count—after stating the writ and precept, and that the plaintiff was a burgess, and on the register—proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in the poll-books; that he was requested so to do; but that he, contriving and *wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff*, and to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books, to the end and intent aforesaid, refused so to receive the same, or to admit and allow the same to be so entered and recorded, to the end and intent aforesaid; but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of *votes tendered*, in the poll-books, and, at the close of the poll, refused to reckon, include, and cast up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate; *whereby* the plaintiff was deprived of the benefit of his right to vote at that election. 866

The third count—after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote—alleged that it was the duty of the defendant, as returning officer, to enter the vote on the poll-books without entering into or allowing a scrutiny; but that the defendant, knowing the premises, but contriving and *wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify the plaintiff*, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, *wrongfully* ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and *wrongfully* took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at that election; *whereby* the plaintiff was delayed, hindered, and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that parliament, the plaintiff's vote being so hindered, &c. *Ibid.*

Held, that, although the defendant, in refusing to admit the vote of the plaintiff, had mistaken his duty as returning officer, and had acted in contravention of the 82d section of the 6 & 7 Vict. c. 18, and might have there-

by subjected himself to a criminal prosecution for the breach of a public duty, yet that the rejection of the vote could not be made the ground of a civil action at the suit of the person rejected, that person having, in fact, become disqualified to vote by reason of non-residence. *Pryce v. Belcher*. Page 866

II. For a Nuisance.

1. Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants,—such liability attaches only upon parties in actual possession. *Rich v. Banterfeld*. 783
2. Where, therefore, an action was brought against A., the owner of premises, for a nuisance arising from smoke out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage,—on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein:—*Held*, that the action would not lie. *Ibid.*
3. *Held*, also, that, inasmuch as the premises were in the occupation of B., a tenant, at the time the fires were lighted, A. was entitled to a verdict on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimney was erected. 783

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CHARITABLE USE.

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II. Declared void by Statute.

1. A contract entered into in contravention of a statutory provision, whether the prohibition is express, or is implied from the imposition of a penalty, will not support an action. *Cundell v. Dawson*. Page 376
2. A statute (1 & 2 Vict. c. ci. s. 3) enacted, "that, with any quantity of coals exceeding 560*lbs.* delivered by any cart, wagon, or other carriage, within the cities of London and Westminster, or within twenty-five miles from the general post-office, the seller should deliver or cause to be delivered to the purchaser, or to his agent or servant, immediately on the arrival of the cart, wagon, or other carriage in which such coals should be sent, and before any of such coals should be unloaded, a ticket, according to a certain form; and that, in case any such seller should not deliver or cause to be delivered such ticket as aforesaid to the purchaser of such coals, or to his agent or servant, before any part of such coals were unloaded, every such seller should, for every such offence, forfeit and pay any sum not exceeding 20*l.*" By the form given, the ticket was required to be "signed" with the name or names of the seller or sellers, and that of the carman, in words at full length;

—*Held*, that the neglect to deliver such ticket might be pleaded in bar to an action for the price of the coals. Page 376

3. In debt for goods sold and delivered, the defendant pleaded, that the goods were divers quantities of coals by the defendant purchased of the plaintiffs, and by the plaintiffs sold and delivered to the defendant; that the said quantities of coal were respectively delivered by the plaintiffs to the defendant after the passing of the above act; that each of the quantities of coal so sold and delivered, at the respective times of the sales and of the deliveries thereof, exceeded in weight 560*lbs.*, and that each of the quantities of coals was so delivered, within the city of London, in two carts and two wagons; that the plaintiffs were the sellers of the said quantities of coals; and that the plaintiffs, so being the sellers, did not deliver or cause to be delivered to the defendant, or to his agent or servant, immediately on the arrival of the carts and wagons, and before any of such quantities of coals were unloaded, a ticket with each of the said quantities of coals, nor with any of them, according to the required form, signed by the plaintiffs, with their names in words at full length, according to the statute; and that the defendant, at the times of the said sales and deliveries of the coals, was not a seller of, or dealer in, coals, nor did he purchase the same, or any part thereof, at the coal market:—

Held, that the plea sufficiently alleged an omission to deliver a ticket, in contravention of the statute; that it properly alleged the want of signature by the sellers; and that the fact of the defendant being a dealer in coals at the respective times of the sales and deliveries, or of his having purchased the coals at the coal market,—by which the necessity of delivering a ticket would have been dispensed with,—was sufficiently negatived. 376

III. Sale of an Office.

An agreement whereby—after reciting that A. had carried on the business of a law-stationer at G., and also had been sub-distributor of stamps, collector of assessed taxes, &c., there, and that he had agreed with B. for the sale of the said business, and of all his goodwill and interest therein, to him, for the sum of 300*l.*—A., in consideration of the said sum of 300*l.*, agreed to sell, and B. agreed to purchase, the said business of a law-stationer at G.; and whereby it was further agreed that A. should not at any time after the 1st of March then next carry on the business of a law-stationer at G., or within ten miles thereof, or collect any of the assessed taxes, &c., but would use his utmost endeavours to introduce B. to the said business and offices,—is illegal and void, as being a con-

tract for the sale of an office, within the 5 & 6 Edw. 6, c. 16, and also within the 49 Geo. 3, c. 126. *Hopkins v. Prescott*. Page 578

CONVEYANCE BY MARRIED WOMAN.

See HUSBAND AND WIFE, I.

COSTS.

I. Costs of the Cause.

1. To a declaration containing two special counts on two different contracts, a count for work and labour, and a count upon an account stated, the defendant pleaded, as to the whole, non assumpsit; to the first and second counts respectively, pleas in justification; and to the fourth, a plea of payment.

The verdict was entered for the defendant upon so much of the issue on non assumpsit as related to the first, third, and fourth counts, and for the plaintiff upon the special pleas; and the court arrested judgment upon the second count, in respect of which a verdict had been found for the plaintiff on non assumpsit.

Held, that the defendant was entitled to the general costs of the cause. *Elderton v. Emmens*. 498

2. *Held*, also, that the master properly disallowed the plaintiff the expenses of witnesses called by him in support of, but not exclusively applicable to, the issue upon which he was successful. 498

II. Of Issues.

After Judgment on Demurrer.—In assumpsit on a special agreement, the defendant pleaded non assumpsit, and a special plea, (going to the whole cause of action,) to which the plaintiff demurred. At the trial of the issue of fact, a verdict was found for the plaintiff, with 5*l.* damages; and the defendant afterwards obtained judgment on the demurrer to the special plea.—*Held*, that the plaintiff was entitled to the costs of the trial of the issue of fact. *Clarke v. Allatt*. 335

III. Of Motions and Rules.

1. Judgment for the defendants is signed on the 14th of November, 1846, and, on the 9th of March, 1847, the costs in the cause are taxed.—It is competent to the defendants afterwards to tax their costs of a rule for a new trial obtained by the plaintiffs on the 20th of November, 1846, and discharged, with costs, on the 15th of January, 1847,—the costs of such rule not being costs in the cause. *Newton v. Boodle*. 359

Two of the defendants pleaded separately, and were represented by different counsel, though by the same attorney.—*Held*, that they were entitled to present for taxation separate bills of costs on the rule. *Ibid*.

2. In an action of trespass by husband and wife, for an alleged false imprisonment of the latter, a verdict was found for the defendants. The plaintiffs obtained a rule nisi for a new trial, which was discharged with costs. The female plaintiff afterwards obtained a rule nisi to amend that rule by striking out so much of it as directed costs to be paid by her, on the ground that she was no party to it, and that a married woman suing or being sued with her husband, is not liable to costs: The court discharged such rule, with costs, to be paid by the wife. Page 359

IV. Of Attendance of Counsel at Chambers

The costs of the attendance of counsel before a judge at chambers, will in no case be allowed in future, unless the judge shall certify their allowance. 227

V. In Action for a Trespass committed after Notice.

In trespass for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40*s.*, which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him.—*Held*, that the leaving the stumps and stakes on the land was a new trespass: that the plaintiff was entitled to full costs in an action for their continuance after the notice, though he recovered less than 40*s.*, and the judge refused to certify that the trespass was wilful and malicious, under the 3 & 4 Vict. c. 24, s. 2; and that the proper mode of obtaining such costs, was, by entering a suggestion on the record, under the 3d section, that the trespass was committed after notice. *Boyer v. Cook*. 236

VI. Of Interpleader Rule.

See INTERPLEADER, 2.

VII. Reviewing Taxation.

1. This court will not entertain an application to review the taxation of costs, after a transcript of the record has gone to the court of error. *Newton v. Boodle*. 359
2. Or where the amount alleged to have been improperly allowed, is less than 40*s.* *Ibid*.
3. The master, in taxing the costs of a trial, having allowed a large sum for costs incurred in the execution of a commission for the examination of witnesses in India, without exercising any discretion as to the propriety of the particular charges.—The court directed him to review his taxation. *Stewart v. Steele*. 400

COUNSEL.

Costs of—See COSTS, IV.

COVENANT.

Breaches of Covenant by Sub-lessees.

1. A. being lessee of a messuage under the corporation of London, demised it, in 1829, to B, C., and D., for twenty-one years; the lessees covenanting to repair, and to insure "in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster, as B, C., and D., (the lessees,) their executors, &c., should think fit;" with a proviso for re-entry for breach of any of the covenants.

In 1835, C., by indenture, granted an underlease to E. and F., for the residue of the term, wanting one day; the underlease containing the like covenants to repair, and to insure "in the sum of 2500*l.* at the least, in The Protector Fire Insurance Office, or in such other respectable fire insurance office in London or Westminster as E. and F., their executors, &c., should think fit;" and also a proviso for re-entry for breach of any of the covenants.

The messuage being out of repair, and uninsured, the executors of A., in 1843, brought ejectment, and recovered possession—*Held*, that C. was not entitled to recover against E. and F. the value of his reversionary interest,—the loss thereof not being the result of *their* breaches of covenant, but of the breaches of covenants by C., to which covenants they were no parties. *Logan v. Hall.* Page 598

2. *Held*, also, that the execution by the defendants of the indenture of underlease, and payment of rent thereunder to C., was sufficient evidence for the jury that C. was solely entitled to the reversion expectant upon the determination of the underlease. 598

DE INJURIA.

See PLEADING, II. ii.

DEMAND OF POSSESSION.

See EJECTMENT, I.

DEMURRER.

The addition of causes of demurrer, after the signature of counsel, does not make a demurrer special. *Clarke v. Allatt.* 335

And see PLEADING, IV.

DEPARTURE.

See PLEADING, III.

DEVISE.

See CHARITABLE USE.

DISCLAIMER OF TITLE.

See EJECTMENT, I.

DISSOLUTION.

Of Partnership—See PARTNERS.

DISTRESS.

See LANDLORD AND TENANT.

DISTRINGAS.

See PRACTICE, I. 2.

DUPLICITY.

See PLEADING, I. i. 1, 2.

EJECTMENT.

I. Notice to quit.

A lease for years not warranted either at common law, or by 32 H. 8, c. 28, was made by A., tenant in tail, to B. After A.'s death, C., the next entail in remainder, demanded the arrears of rent accruing in C.'s time. After some negotiation, B. refused to pay the arrears to C., alleging that D., and not C., was entitled to the estate-tail—*Held*, that no tenancy was created between C. and B., and that C. might maintain ejectment against B. without notice to quit or demand of possession,—that the setting up of the title of D. amounted to a disclaimer of the title of C.;—and that, for the purposes of the action of ejectment, the entry confessed in the consent-rule was sufficient to determine the lawful possession of B. *Doe d. Phillips v. Rollings.* Page 188

II. Demand of Possession—Ante, I.

III. Disclaim of Title—Ante, I.

IV. Entry confessed by the Consent-rule—Ante, I.

V. Motion for Judgment under 4 G. 2, c. 28, s. 2.

1. *Quere*, whether upon a motion for judgment against the casual ejector, under 4 G. 2, c. 28, s. 2, an affidavit stating that an amount exceeding half a year's rent was in arrear, and that there was "no sufficient distress to be found upon the premises, countervailing the said arrears of rent then due," is sufficient: or whether the affidavit should state that the property upon the premises was insufficient to countervail half a year's rent. *Doe d. Gretton v. Roe.* 576
2. Where judgment had been obtained upon an affidavit which the party was apprehensive might be held to be defective in this respect, the court allowed such judgment to be superseded, and another judgment to be signed, upon an amended affidavit. *Ibid*

3. *Scoble*, that no special ground for setting aside the first judgment was necessary. *Doe d. Gretton v. Roe*. Page 576

VI. Consent-Rule.

The undertakings contained in the common consent-rule are *personal*, and binding only to the extent of creating a liability to attachment.

They cannot be enforced by the representatives of a deceased party. *Doe d. Harrison v. Hampson*. 745

VII. Service of Declaration and Notice.

1. *On Mother-in-law of Tenant*.]—A declaration and notice in ejectment were left with the mother-in-law of the tenant (being herself tenant of part of the premises) on the day before the term, and the wife of the tenant on the same day acknowledged that she had received it, and it was then explained to her; but it did not appear that the acknowledgment took place on the premises:—*Held*, insufficient even for a rule nisi. *Doe d. Royle v. Roe*. 256
2. A declaration and notice in ejectment were left with, and the notice was read and explained to, the mother-in-law of A., the tenant, (herself tenant of part of the premises,) the day before the term; the wife of A., on the same day, upon the premises, acknowledged that she had received it, and it was then explained to her; and A., on a subsequent day, admitted that the declaration came to his hands on the day on which it was served:—*Held*, good service. *Doe d. Royle v. Roe*. 258

VIII. Title of Declaration in, 193 (b).

ELECTIVE FRANCHISE.

See CASE, I.

EMBLEMETS, 624 (a)

ENTRY.

Confession of—See EJECTMENT, I.

To avoid a fine, 197.

ESCAPE.

See SHERIFF, I.

ESTOPPEL.

By Indenture, 621, n.

EVIDENCE.

I. Of Title to a Reversion.

Execution of underlease from A. to B., by B., the sub-lessee, and payment of rent by B. to A., sufficient evidence for a jury, that, although A. was originally co-lessee with C., A. is solely entitled to the possession. *Logan v. Hall*. Page 598

II. Attesting Witness.

Proof of Handwriting.]—To dispense with calling the attesting witness to an indenture of submission, (who was the son of the defendant,) the plaintiff proved that repeated attempts had been made to find him, in order to serve him with a *subpoena*, by calling at his father's house, and at several other places where he had resided, and also at a hospital, at which he was, as a student, in the habit of attending lectures; and that, these attempts failing, a summons had been taken out, calling on the defendant to admit the execution of the indenture, on which the judge endorsed, "No order; the defendant refusing to give any information;"—*Held*, that enough had been done to justify the reception of the indenture, upon proof of the handwriting of the subscribing witness. *Spencer v. Payne*. Page 328

III. Commission for Examination of Witnesses under 1 W. 4, c. 22.

A commission having been granted by the court of Chancery, for the examination upon interrogatories, of a witness for the defendants in an issue,—this court refused to vary the terms of that commission, by empowering the plaintiff to cross-examine the witness under it, *visu voce*, or to issue another commission for that purpose. *Hargrave v. Hargrave*. 648

IV. Commission to examine Witnesses in India—See COSTS, VII. 3.

FALSE REPRESENTATION.

See RAILWAY COMPANY.

FEME COVERT.

Liability for Costs—See COSTS, III. 2.
And see HUSBAND AND WIFE.

FINE.

Avoidance of, by entry or action, 197 (b).

FORFEITURE.

Application of the term to an accrued right of re-entry. 699, n.

FOREIGN ATTACHMENT.

See LONDON.

FRIENDLY SOCIETY.

Election of Treasurer.

By the rules of a friendly society, enrolled under the 10 G. 4, c. 56, the power of electing a treasurer and other officers was vested in a committee of *eleven*. At a meeting of the committee, at which *ten* of the members

only were present,—the eleventh not having received notice,—the defendant, the former treasurer, was removed, and the plaintiff appointed in his stead, by a majority of the votes:—*Held*, that the election was void, although the absent committeemen had, for a considerable period, ceased to attend the meetings, and had intimated an intention not to attend any more, and although the defendant had demanded a poll. *Roberts v. Price*. Page 231

FRIVOLOUS DEMURRER.

See PLEADING, IV. iii.

HANDWRITING.

See EVIDENCE, II.

HIGHWAY RATE.

Under Local Act.

By a local act for the improvement of a particular portion of a parish, it was provided that every inhabitant or owner who should be assessed for the rates made under that act for any lands or tenements within the limits of the act, should be released and free from all rates and assessments towards the paving and lighting any other street, road, or place within the parish, in respect of such lands or tenements:—*Held*, that this did not exempt an occupier of premises assessed within the local district from being assessed in a general highway rate imposed upon the parish, although a portion of such rate might be expended in paving parts of the parish out of the district. *Richardson v. Tubbs*. 304

HUSBAND AND WIFE.

I. Conveyance by Married Woman under 3 & 4 W. 4, c. 74.

1. *Affidavit, where Acknowledgment taken abroad.*—In the case of an acknowledgment taken abroad, the court will not dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule. *In re Sophia Crawford*. 626

2. *Wife's Provision.*—The court refused to allow a certificate of acknowledgment by a feme covert, under the 3 & 4 W. 4, c. 74, to be filed, where it appeared from answers to the inquiry of the commissioner as to whether she intended to give up her interest in the estate, without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will,

—although it was shown, by another affidavit, that she perfectly understood that to be no provision, inasmuch as the will was revocable. *In re Mary Dixon*. Page 631

II. Liability of the Wife for Costs—See Costs, III. 2.

INDIA.

Commission to examine Witnesses—See Costs, VII. 3.

INDUCEMENT, 805, n.

Matter of, not traversable. 282, n.

INFANT.

See PLEADING, I. i.

INFERIOR COURT.

Commitment by Judge of.

1. Where, under the 8 & 9 Vict. c. 127, a 1, the judge of an inferior court of record has, upon proof of the ability of the party, made an order *simpliciter* for the payment of a debt by instalments, he cannot, after default made, grant a warrant of imprisonment without giving the debtor an opportunity of being heard against the granting of such warrant. *Ex parte Kinning*. 507
2. *Semble*, (by CRESSWELL, J.) that, under this statute, an order of commitment upon non-payment cannot be embodied in the original order to pay. *Ibid*.
3. Whether there is jurisdiction under this statute to commit when the defendant is not resident within the district, *quære*. *Ibid*.

INN.

Protection of goods in, from distress. 561 (b).

INNKEEPER.

Obligation of, to receive guests. 555 (a).

INSOLVENT DEBTOR.

I. Replication of Discharge under 1 & 2 Vict. c. 110, to a Plea of Set-off.

1. Although a discharge under the insolvent debtors act, 1 & 2 Vict. c. 110, does not operate as a complete extinguishment of a debt scheduled, the creditor is not entitled to plead such debt by way of set-off to an action brought against him by the insolvent for a demand accruing subsequently to his discharge. *Francis v. Dodsworth*. 202
2. To debt for 64*l.* 8*s.* 4*d.*, for work and labour, interest, and on an account stated, the defendant pleaded—first, except as to 10*l.*, never indebted—secondly, a set-off of “a sum equal to the amount of all the debts in

the declaration mentioned," &c., except as aforesaid, for work and labour as a surgeon and apothecary, &c.—thirdly, as to 10*l.*, payment into court.

The plaintiff joined issue on the first plea, took the 10*l.* out of court, and replied to the second, as to 30*l.* 12*s.* 6*d.*, parcel, &c., that, on, &c., he, the plaintiff, then being an insolvent debtor in actual custody, &c., was duly discharged, according to the 1 & 2 Vict. c. 110, of and from the said sum of 30*l.* 12*s.* 6*d.*, and that the said order and discharge still remained in full force, "and that this the plaintiff was ready to verify;" and that the plaintiff never was indebted in the residue of the money alleged in the second plea to be due from him to the plaintiff, concluding to the country:—

Held, that the replication was bad on special demurrer, for not setting out the several matters necessary to show that the plaintiff was entitled to his discharge under the statute, or that he had duly complied with its requisitions. *Francis v. Dods-worth*. Page 202

3. Whether the double conclusion was good, or whether the whole ought to have concluded to the court, *quere*. *Ibid*.

II. *Discharge under 5 & 6 Vict. c. 116. Plea of*—See PLEADING, I. IV.

And see SHERIFF, I.

INSPECTION.

Of Private Documents.

See PRACTICE, III.

INSURANCE.

Total Loss.

A policy contained a clause, that the ship was to be "allowed to be sea-worthy during the voyage." In the course of the voyage she met with a violent storm, by which she was much damaged, and obliged to put into the Mauritius. On examination there, it was found that the ship would require very extensive repairs to make her sea-worthy, and that the cost of such repairs would exceed her value when repaired: that many of the beams were broken, and many of the bolts and fastenings loosened; and that the vessel being old, and in many parts decayed, the decayed parts could not be again made use of, as they would not bear re-bolting, but would require to be replaced with new timbers.

In an action upon the policy, averring a total loss by a peril insured against, the judge left it to the jury to say whether the costs of the repair of the damage arising from the perils insured against would have been greater than the value of the ship when repaired; telling them, that, if they

were of that opinion, they should find for the plaintiff,—which they did:—

Held, that this was a correct direction, and the verdict warranted by the evidence; for, that the judge was not bound to tell the jury, that, in considering the repairs that were necessary, they must exclude from their estimate all such repairs as were rendered necessary by the decayed state of the ship. *Phillips v. Nairne*. Page 343

INTENTION.

See LETTERS-PATENT, II.

INTERPLEADER.

Sheriff's Rule.

1. The sheriff is not entitled to call upon parties to interplead, where he has already exercised a discretion in the matter. *Crump v. Day*. 760
2. The sheriff, on the 20th of May, entered for the purpose of making a levy on the goods of B, under a *fi. fa.* at the suit of A. Finding that B's person and property were protected by an order of a commissioner of bankrupts, under the 7 & 8 Vict. c. 96, the sheriff withdrew. On the 21st, C. purchased the goods from the official assignee; and, on the 3d of June, B's petition being dismissed, the sheriff, who had been ruled to return the writ, entered a second time for the purpose of making a levy. Being then met by C's claim, the sheriff obtained a judge's order directing an issue under the interpleader act, to try whether or not the goods seized by him, were, at the time of the second levy, the property of C. The plaintiff thereupon obtained a rule calling upon the sheriff and C. to show cause why that order should not be set aside, on the ground that the sheriff had by his laches, in not applying on the 20th of May, precluded himself from the benefit of the interpleader act; or why the order should not be amended, by substituting the date of the *first*, for that of the *second* levy:—

The court made the rule absolute for setting aside the order, but directed that A. should pay C's costs of appearing on the rule, inasmuch as the appearance of C. was necessary for the purpose of opposing an amendment, the effect of which would have been, to require him to sustain a title he had never set up.

3. On the 16th of January, 1847, the sheriff seized certain goods and moneys of the defendant under a *testatum fi. fa.*, the net proceeds of which he handed over to the plaintiffs in part satisfaction of their judgment. He at the same time seized certain bills of exchange and a promissory note, which, not being due, he retained. On the 3d of February, he received a notice that a *fiat in*

bankruptcy had issued against the defendant. On the 4th, he was ruled to return the writ; and, on the 11th, he returned what he had done under the writ. On the 18th, he received notice that assignees had been appointed; and the bills and notes were then claimed on their behalf. After some negotiation with the solicitor to the *fiat*, the sheriff took out an interpleader summons on the 29th of April;—*Held*, that he had by his laches disentitled himself to relief. *Mutton v. Young*. Page 371

INTERESSE TERMINI, 192 (a).

JOINT-STOCK COMPANY.

See RAILWAY COMPANY.

JUDGE'S ORDER.

1. *Service of*.]—A party who obtains a judge's order, can derive no benefit from it unless it be duly served upon his opponent. *Belcher v. Goodered*. 472
2. *Stay of Proceedings*.]—A judge's order staying the proceedings until a given day, in order to afford time for an application to the court, does not dispense with the necessity of the ordinary notice of motion, in order to entitle the party to have his rule nisi drawn up with a stay of proceedings. *Ibid*.

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, V.

JURAT.

Form of—See AFFIDAVIT, II.

LACHES.

See INTERPLEADER, I.

LANDLORD AND TENANT.

I. What distrainable.

Horses and carriages standing at livery are not exempted from distress for rent. *Parsons v. Gingell*. 545

II. Retention of Goods distrained.

A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained—although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West v. Nibbs*. 172

LEASE.

Extent of liability of lessee and assignee. 615, n.

Subject to right of re-entry, not determined until actual entry by or on behalf of landlord. Page 601, n.

LETTERS-PATENT.

I. Particulars of Infringements.

1. In an action for infringing a patent, the court has a general power to order a particular of the alleged infringements. *The Electric Telegraph Company v. Nott*. 462
2. But, where the specification claimed a combination of numerous improvements, (in electric telegraphs,) the court refused to compel the plaintiffs to give the defendants such particulars,—conceiving, that, from the nature of the patent, the plaintiffs would be thereby put to great difficulty and embarrassment, and that, under the circumstances, (the matter having been debated in Chancery upon a motion for an injunction,) the defendants must be taken to possess adequate information on the subject. *Ibid*.

II. Infringement.

In case for infringement of a patent, the defendant pleaded not guilty,—that the plaintiff was not the true and first inventor,—and that the invention had been previously wholly or in part publicly and generally known, used, practised, and published in England:—

Held, that the issue on the first plea must be determined by the acts done by the defendant without reference to the existence or the non-existence of a fraudulent intention;—that the second plea would be proved by showing a publication before the date of the letters-patent,—and that the third plea only raised a question of user before the grant of the letters-patent. *Stead v. Anderson*. 806

LIREL.

Joinder of plaintiffs in an action for. 264 (a).

Colloquium.

"Warning. J. C. & Co., share-brokers, (meaning the plaintiffs,) are informed that the 200 Manchester and Southampton Railway shares bought by J. C., under a false representation of the market, at 8l. per share, or 1625l., and sanctioned by C. J., (meaning the defendant,) and paid for at the time of purchase, that he forthwith sends them to the Manchester and Southampton committee, with instructions to return the deposit balance to him, (meaning the defendant,) unless C. & Co. (meaning the plaintiffs) claim it, or elect to proceed; and, unless C. & Co., (meaning the plaintiffs,) within the present year, arrange to return the 1625l. to him, (meaning the defendant,) also the 7l. expenses incurred for advertisement and solicitor to procure proof of having paid C. & Co. (meaning the plaintiffs) 1600l. and 25l. commission, C. J. (meaning

the defendant) will adopt legal measures. The amount will be taken by instalments, on security being deposited with any bankers but those who recommended C. & Co.:"—

Held, that, in the absence of a *colloquium* pointing the above, or an averment of special damage, the publication was not actionable. *Capel v. Jones*. Page 259

LIGHTING AND PAVING.

See HIGHWAY RATE.

LIMEKILN, 805, n.

LIMITATIONS (STATUTE OF).

See BOND.

LIVERY STABLE.

Horses and carriages standing at livery are not exempted from distress for rent. *Parsons v. Gingell*. 545

LOCAL ACT.

See HIGHWAY RATE.

LONDON.

Attachment in the Mayor's Court.

1. In an action by A. against B, execution executed upon a foreign attachment in the lord mayor's court of London, is a good plea in bar of the further maintenance of an action in this court against C, the garnishee, in respect of the same debt. *Webb v. Herrell*. 287
2. A plea, alleging that the plaint was levied in the lord mayor's court before the commencement of the suit here, but not averring that the *scire facias quare executionem* now issued against C. had issued before the commencement of the suit here—is sufficient. *Ibid*.
3. In such a case, the plea,—following the allegation of the custom, which was not traversed,—stated, that, at a certain court, it was commanded to the serjeant-at-mace, that he, according to the custom, should warn the defendant, without setting forth any precept:—*Held*, sufficient. 545

MALICE.

See CASE, I.

MARINES.

Sale of commission in, void, under 5 & 6 Edw. 6, c. 16. 579, n.

MATERIAL ALLEGATION.

See PLEADING, II. iii.

MAYOR'S COURT.

See LONDON.

MEMORANDUM, 225.

MERITS.

Affidavit of—*See* PRACTICE, VIII. 5.

MINE.

Liability of Co-adventurers.

One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body, for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. *Rickets v. Bennett*. Page 686

MISNOMER.

See PRACTICE, VII.

MITTIMUS.

To C. P. of record out of Chancery. 654, n.

MORTMAIN.

See CHARITABLE USE.

MULTIFARIOUSNESS.

See PLEADING, I. i.

MUTUAL PROMISES.

See ATTORNEY, II. 2.

NEW ASSIGNMENT.

See PLEADING, III.

NON-ASSUMPSIT.

See PLEADING, I. i. 4.

NONSUIT.

Judgment as in case of—*See* PRACTICE, V.

NORLAND ESTATE.

See HIGHWAY RATE.

NOTICE TO QUIT.

Dispensation with, by disclaimer. 191 (b).

NUISANCE.

Action upon the Case for—*See* CASE, II.

OFFICE.

Contract for sale of—*See* CONTRACT, III.

ORDER.

See JUDGE'S ORDER.

PARLIAMENT.

Action against Returning Officer for refusing Vote.

See CASE, I.

PARTICULARS.

Of Infringements—See LETTERS-PATENT, I.

PARTNERS.

Evidence of Dissolution.

The defendant, who had dealings with A. and B. as partners, afterwards made a contract with A. in B.'s presence, and received letters with reference to such contract, bearing the signature of the firm. In an action by B., A., who was called as a witness, stated that he had ceased to be a partner prior to the date of the contract, and that he made it as agent for B. — *Held*, that the jury were warranted in finding that the contract was with B. alone, although there was no precise evidence of the dissolution of the partnership between A. and B. *Cox v. Hubbard.* Page 317

And see BANKING COMPANY. MINE.

PAVING AND LIGHTING.

See HIGHWAY RATE.

PAYMENT.

Argumentative Plea of—See PLEADING, I. i. 2.

PETTY BAG OFFICE, 654, n.

PLEADING.

I. *Pleas.*

i. *Multifariousness, Duplicity, Argumentativeness, and Ambiguity.*

1. To a count by drawer against acceptor of a bill of exchange, the latter pleaded that he accepted the bill in blank whilst he was an infant, that the plaintiff afterwards altered it, by dating it of a day subsequent to the defendant's attaining his majority, and that the defendant never ratified or assented to such alteration after he came of age. — *Held*, (on special demurrer,) that the plea was not multifarious, double, or ambiguous. *Harrison v. Cotgrave.* 562

2. To a count on a bill of exchange, the defendant pleaded, that, after the bill became due, he made a promissory note payable to the plaintiff's order on demand, and delivered the same to the plaintiff, who took and received the same, "for and on account of" the bill, and the causes of action in respect thereof; and that afterwards he delivered to the plaintiff a warrant of attorney, and that the plaintiff accepted and received the same, in full satisfaction

and discharge of the said note, and of all causes of action in respect thereof, and of the causes of action in the count mentioned: *Held*, that the plea was not double. *Fearne v. Cochrane.* Page 274

3. *Quere*, whether it was bad, as being an argumentative plea of payment. *Ibid.*
4. In assumpsit by vendee against vendor, for not delivering a proper abstract of title, the declaration alleged that the sale was subject to a condition that the vendor should deliver an abstract of title to the purchaser; and assigned a breach, in the non-delivery of any abstract showing such a good and sufficient title as the plaintiff was, according to the condition, entitled to require to be shown.

Plea, that, at the time of the making of the promise, it was agreed, as part of the contract, that the defendant should deliver an abstract of his title, commencing with a deed of conveyance from A. to B., dated, &c., only, and should not be required to furnish any other abstract, or go into any previous title, &c.

Held, bad, on special demurrer, as an argumentative and circuitous denial of the contract stated in the declaration, and amounting to non-assumpsit only. *Sharland v. Leifchild.* 529

ii. *Non-joinder of Co-contractor.*]—A plea in abatement of the non-joinder of co-contractors resident within the jurisdiction of the court, alleging that the contract was made with the defendant and such resident co-contractors, and also with other co-contractors resident without the jurisdiction of the court, is bad; the statute 3 & 4 W. 4, c. 42, s. 8, requiring the defendant to state in his plea that all are resident within the jurisdiction, and to verify the residence of all by affidavit. *Joll v. Lord Curzon.* 249

iii. *Discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110.*—See INSOLVENT DEBTOR.

iv. *Discharge under 5 & 6 Vict. c. 116.*]—In pleading a discharge under the 5 & 6 Vict. c. 116, the proceedings in conformity with s. 4, or the order for protection and distribution under sect. 10, should be set out. *Wright v. Hutchinson.* 569

v. *Plea to the Jurisdiction of the Court*—See PRACTICE, VII. 5.

II. *Replications.*

i. *Statute of Limitations.*]—Replication to a plea of the statute of limitations, in debt on bond. *Tuckey v. Hawkins.* 655

ii. *De injuria.*

To a count in assumpsit for money paid to the defendant's use, the defendant pleaded that the money was paid for differences on time

bargains in the funds, in violation of the statute 7 G. 2, c. 8:—*Held*, that *de injuria* was a good replication. *Mortimer v. Gell*. Page 543

iii. Admissions in Pleading.

In a debt by A. against B., on a bond entered into jointly and severally by B. and C. to A. in the penal sum of 5000*l.* the condition, (set out an *oyer*.) after reciting that C. had been appointed collector of taxes, and that A. had consented to become one of his sureties, was stated to be, that B. and C. should keep harmless and indemnify A. from and against all costs, charges, &c., which he should incur in consequence of his becoming such surety. B. pleaded that A. had not, at any time since the making of the bond, been in anywise damnified by reason or means of any matter, cause, or thing in the condition mentioned. To this plea, A. replied, that C. continued collector until, &c.; that, during the said time that C. continued such collector, "divers large sums of money, amounting in the whole to a large sum of money, exceeding 500*l.*, to *wit*, 2006*l.* 7*s.* 10*d.*," came to the hands of C.; and that C. did not pay over the same, or any part thereof, to the receiver-general: and A., for assigning a breach of the condition of the bond, said, that by reason of such default, he was called upon by the receiver-general, and forced and compelled to pay, and did pay to the receiver-general, a large sum of money, to *wit*, 500*l.*, parcel of the moneys so received by C. as such collector. To this B. rejoined, that A. was not forced or obliged to pay the said sum of money in the replication in that behalf mentioned, or any part thereof, in manner and form as alleged:—

Held, that, by this rejoinder, the receipt of 500*l.* by C. was not admitted; and that, in the absence of evidence to show that some money had been received by C., nominal damages only could be assessed on the breach assigned.

Held, also, that the mere production of a judgment signed against A., under a judge's order, for 500*l.*, at the suit of the receiver-general, was not evidence of the amount of the damage sustained by A. in consequence of his suretiship. *King v. Norman*. 884

Ant see **INSOLVENT DEBTOR.**

III. New Assignment.

Departure.]—1. In trespass against B. and C., for seizing and converting the goods of A., B. alone justified the seizure and impounding of the goods as a distress for rent, within thirty days after they had been wrongfully removed from the demised premises. A. new assigned, that he brought his action, not for the trespasses in the plea mention-

ed, but for that B., after the seizure, and after payment and acceptance of the rent and expenses, and after he ought to have restored to A. the goods so distrained, retained possession thereof, and sold and disposed of them:—*Semble*, that this was no departure. *West v. Nibbs*. Page 172

2. *Quere*, whether departure may be taken advantage of on *general demurrer*. *Ibid*.

IV. Demurrers.

i. *General or Special*.]—The addition of causes of demurrer, after the signature of counsel, does not make a demurrer *special*. *Clarke v. Allatt*. 335

ii. *To part of a Replication*.]—*Quere*, as to the right of a defendant to demur to part of an entire replication, and to join issue upon the residue. *Francis v. Dodsworth*. 202

iii. *Frivolous*.]—1. In an action by an executor upon a bond given to his testator, a demurrer to a replication traversing a payment alleged in the plea to have been made to a party stated to have been a co-executor with the plaintiff, but not shown to be alive,—on the ground that the plaintiff has omitted to describe himself as *surviving executor*,—is a frivolous demurrer. *Trickey v. Hawkins*. 655

2. To a declaration upon a guarantee, the defendant, who was under terms to plead *issuably*, demurred generally, on the ground that it disclosed no consideration for the promise stated.

A judge at chambers having set aside the demurrer as frivolous, the court rescinded his order,—holding, that the construction of the guarantee was open to argument; and that the demurrer was therefore not frivolous, within the rule. *White v. Woodward*. 752

V. Particular Points.

1. *Admissions*—*Ante*, II. iii.
2. *Ambiguity*—*Ante*, I. i. 1.
3. *Argumentative Traverse*—*Ante*, I. i. 2, 4.
4. *De Injuris*—*Ante*, II. ii.
5. *Demurrers*—*Ante*, IV.
6. *Departure*—*Ante*, III.
7. *Duplicity*—*Ante*, I. i. 1, 2.
8. *Foreign Attachment*—*See LONDON*.
9. *Frivolous Demurrer*—*Ante*, IV. iii.
10. *Infancy*—*Ante*, I. i.
11. *Insolvency*—*Ante*, I. iv.
12. *Material Allegation*—*Ante*, II. iii.
13. *Multifariousness*—*Ante*, I. 1.
14. *New Assignment*—*Ante*, III.
15. *Non assumpsit*—*Ante*, I. i. 4.
16. *Non-joinder of Co-contractor*—*Ante*, I. ii.
17. *Statute of Limitations*—*Ante*, II. i.
18. *Stock-jobbing*—*Ante*, II. ii.
19. *Traversable Allegation*—*Ante*, II. iii.

POSSESSION.

Demand of—See EJECTMENT, I.

POST.

Notice sent by. 237, n.

POST OBIT BOND.

See BOND.

PRACTICE.

I. Process.

1. *Summons*.]—*Vide post*, VI. 1.
2. *Distringas*.]—Upon a motion for a distringas, an affidavit stating that the deponent "explained the nature and object of his visit," is insufficient. *Dubois v. Louthier*. Page 228

II. Striking out Counts or Pleas.

Apparent Violation of R. H. 4 W. 4, r. 5.]—

1. Where a judge at chambers has declined to make an order, upon an application, under the 5th and 6th rules of Hilary term, 4 W. 4, to strike out counts, as being in apparent violation of the former rule,—it is competent to the court to entertain the matter. *Grissell v. James*. 768
2. A count for goods sold and delivered was not allowed together with a count upon a special contract *apparently* for the price of the same goods, unless the plaintiff could satisfy a judge at chambers that he *bona fide* intended to establish a distinct subject-matter of complaint in respect of each count; *dissentiente*, CRISWELL, J., as to the application of the rule. *Ibid*.
3. The plaintiff contracted to purchase from A. a ship then in course of building at Quebec, and to accept a bill for the price, on the vessel being completed according to the terms of the contract, and registered in his name. On the bill being presented for acceptance, the plaintiff declined to accept it, on the ground that A. had not duly performed his contract; whereupon the defendant undertook, that, if the plaintiff would accept the bill, he, the defendant, would abide by and perform the award of certain referees to be appointed to determine what should be done, in case, on the arrival of the ship at Dublin, the plaintiff should have any cause of complaint against A. in respect of his performance of the contract. On the ship's arrival, the referees awarded that a certain sum was payable to the plaintiff on account of deficiencies in the ship.

The court refused to allow the plaintiff, in declaring against the defendant upon his guarantee, to add to a count for non-performance of the award, a count alleging, that, in consideration of the plaintiff's accepting the bill, the defendant agreed to become per-

sonally responsible for the due performance of the contract by A.—holding the joinder of such counts to be in apparent violation of the 5th rule of Hilary term, 4 W. 4. *Fagan v. Harrison*. Page 910

Not corresponding with the abstract.]—4. Where pleas are pleaded which do not correspond with the abstract delivered with the summons to plead several matters, the proper mode of taking the objection is, by motion to strike out the pleas. *Flight v. Smale*. 766

III. Inspection of Documents.

In an action against the proprietors of a newspaper for the breach of a contract to employ the plaintiff as sub-editor, the defendants justified the dismissal of the plaintiff on the ground of his having, from improper motives, lent himself to the insertion of a garbled report of proceedings in a court of justice.

The court refused to allow the plaintiff to inspect, and take copies of, the original report and of the alleged garbled statement,—he having no recognised legal interest therein. *Powell v. Bradbury* 541

IV. Interpleader Rules—See INTERPLEADER.

V. Judgment as in case of a Nonsuit.

Sufficiency of Excuse.]—In answer to a rule for judgment as in case of a nonsuit in a country cause for allowing two assizes to elapse without proceeding to trial, after notice,—the plaintiff alleged for excuse the uncertainty of the law as to the liability of railway committee-men, and that he was desirous of awaiting the determination of a similar case (the particulars of which, however, were not given) pending in error from the Court of Exchequer.

The court, holding the excuse to be *per se* insufficient, nevertheless discharged the rule upon a peremptory undertaking, on the ground that the defendants had been tardy in their application. *Edwards v. Ward*. 315

VI. Term's Notice of Proceeding.

Where, in this court, there have been no proceedings within *four terms* (or, in Q. B., within a *year*) after issue joined, a term's notice of the plaintiff's intention to proceed must be given before he can give notice of trial: it is not enough to give a term's notice of trial. *Tilley v. Collins*. 758

VII. Setting aside and staying Proceedings.

1. It is no ground for setting aside a writ of summons, that it is framed as a *pluries* writ, when the *præcipe* is for an *alias*, or that it is issued against Baron A., without stating his Christian name. *Wells v. Suffield*. 750
2. A writ issued in an action intended to be brought against one John G., by mistake described him as Henry G., and was served

upon Henry G. The mistake in the service being discovered, notice was given to Henry G. not to appear. A copy of a *plurima* summons was some months afterwards left at the residence of John G., the real defendant, still describing him as Henry G. The defendant gave this copy to Henry G., in whose name one Lewis, an attorney, entered an appearance, demanded a declaration, and afterwards (with full knowledge that the appearance was no appearance in the cause) signed judgment of non-pro. for want of a declaration:—The court set aside the judgment for irregularity, with costs to be paid by the attorney. *Belcher v. Goodered.* Page 472

3. A judge's order staying the proceedings until a given day, in order to afford time for an application to the court, does not dispense with the necessity of the ordinary notice of motion, in order to entitle the party to have his rule nisi drawn up with a stay of proceedings. *Ibid.*

4. In an action against a surety upon a bond conditioned for the due payment to the receiver-general of all sums received by a collector of assessed taxes, a judge at chambers has no authority to order the proceedings to be stayed as to certain items in the plaintiffs' particulars of demand, upon payment of their amount into court. *Kepp v. Wiggitt.* 678

5. The defendant, having entered an appearance in person as "C. F. A. W., Duke of Brunswick and Luneburg, sued as C. F. A. W. D'Este, commonly called the Duke of Brunswick," delivered a plea to the jurisdiction, with an affidavit of verification, respectively intitled "C. F. A. W., sovereign Duke of Brunswick and Luneburg, sued as C. F. A. W. D'Este, commonly called the Duke of Brunswick."

The plaintiff, treating the plea as a nullity, signed judgment:—The court refused to set aside the judgment, without an affidavit of merits. *Munden v. The Duke of Brunswick.* 321

And see EJECTMENT.

VIII. *Second Application for the same purpose.*

A judgment signed in an action brought by A. in the name of B., having been set aside by a judge's order, a rule nisi was obtained to rescind that order, on the ground that the summons upon which it was made had been improperly altered by the defendant's attorney. This rule, which, by mistake, purported to have been moved on behalf of B.,—was discharged upon an affidavit of B., showing that the rule had been moved without any authority from him, and that the alteration in the summons had been made with his sanction:—*Held*, that a second application for the same purpose

might be made on the behalf of A., the party really interested. *Tilt v. Dickson.*

Page 736

IX. *Judge's Order*—*See JUDGE'S ORDER.*

PRÆCIPUE

Mistake in—*See PRACTICE*, VII. 1.

PRESUMPTION.

See WASTE LAND.

PRISONER.

In Custody under Chancery Process.

This court has no power to discharge upon a *habeas* a prisoner from custody under process of the Court of Chancery, and cannot entertain any question as to the irregularity of such process. *In re Andros.* 226

And see SURETIES, I.

PUBLICATION.

See LETTERS-PATENT, II.

RAILWAY COMPANY.

Fraudulent Representation on Allotment of Shares.

The promoters of a projected railway company, in June, 1845, issued a prospectus stating the capital to consist of 3,000,000*l.*, in 120,000 shares of 25*l.* each, and stating, amongst other things, that application would be made for a bill to incorporate the company early in the next session; and that, in case parliament should not sanction the undertaking, the money deposited, deducting the necessary expenses attending the projection, would be returned to the shareholders. On the 25th of September, the plaintiff made application to the provisional committee of management for sixty shares, by a letter in the form prescribed in the prospectus, undertaking to accept the same, or such less number as they might appropriate to him, *subject to the regulations of the company*, to sign the necessary legal documents, and to pay, *when required*, the deposit thereon of 1*l.* 7*s.* 6*d.* per share. The committee, by a letter dated the 11th of October, but not sent until some days after, informed the plaintiff that they had allotted him sixty shares, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon was paid on or before the 18th, in default of which the allotment would be forfeited, and the shares disposed of to other applicants. This letter was headed "Not transferable," and, as well as the letter of application, described the concern as one having the amount of capital and the number of shares mentioned in the prospectus. On

the 17th of October, the committee published an advertisement in *The Times*, stating that "they had completed the allotment of shares." There was evidence for the jury that the plaintiff saw this notice; and he paid his deposit on the 22d of October. On the 4th of November, the plaintiff signed the subscribers' agreement and the parliamentary contract, by which the committee were empowered, amongst other things, to apply the money received for deposits, in liquidation of the preliminary expenses of the undertaking. A meeting of the shareholders was held on the 15th of December, at which the plaintiff for the first time learned, that, although applications had been made before the 17th of October, sufficient to absorb the whole 120,000 shares, 58,000 only had been allotted; and that, in consequence of the plans and sections not being duly deposited to comply with the standing orders, and the want of necessary funds, the committee were not in a condition to go to parliament. At this meeting, resolutions were proposed expressive of confidence in the committee, and of a desire to proceed. The plaintiff moved an amendment, that, as 58,000 shares only had been allotted, the deposits already received should be returned to the parties who had paid them. The chairman declined to put the amendment; and the original resolutions were carried by a large majority. On the 31st of December, the committee came to the conclusion that to proceed with the undertaking would be impracticable; and, on the 6th of January, the plaintiff brought an action for money had and received against the defendant, a member of the committee of management, to recover back his deposit.

At the trial, the judge told the jury that the plaintiff was entitled to a verdict, if the defendant knowingly made a false representation which was a material inducement to the plaintiff to pay his money, and if the plaintiff executed the deed under the same belief that induced him to pay the deposit. The jury having found for the plaintiff:—*Held*, that the direction was right; and that the judge was not bound to tell the jury whether or not the letters of application and allotment constituted a valid and binding contract: that, the letter of allotment not being an unconditional acceptance of the offer made by the letter of application, the two did not constitute a contract under which the plaintiff could have been compelled to pay the deposit: and that the plaintiff had not, by attending the meeting of the 15th of December, precluded his right to rescind the contract on the ground of fraud. *Wentner v. Sharp*.

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RETAINER.

See ATTORNEY, II.

RETURNING OFFICER.

See CASE, I.

REVERSION.

See COVENANT, 2.

RULE.

Drawing up—See BANKING COMPANY, 4.

For Payment of Money under 1 & 2 Vict. c. 110, s. 18.

In cases in which a rule of court for the payment of money has the effect of a judgment, under 1 & 2 Vict. c. 110, s. 18, a rule nisi—calling upon the parties to show cause why the amount should not be paid—is unnecessary. *Dox d. Harrison v. Hampson*.

Page 745

SALE.

I. *Delivery and acceptance of Goods.*

A., a merchant at Birmingham, bought goods of B. & Co., commission-agents at Manchester and Leeds. On the 20th of March, 1844, the goods were, by A.'s direction, sent to L. & Co., shipping-agents at Liverpool, employed by A. to receive and forward them to Valparaiso; and, on the same day, B. & Co. wrote to L. & Co., advising them of the transmission of patterns, which they requested them to ship with the goods, "as A. might direct the same to be shipped." The goods were, on the 4th of April, shipped by L. & Co. on board a vessel bound for Valparaiso, and were afterwards re-landed by order of a member of the house at Valparaiso, to which they were consigned by A., and sent to B. & Co.'s house at Manchester, for the purpose of being re-packed in smaller cases. The price of the goods became payable on the 26th of April, but was not paid, A. having in the meantime become insolvent:—

Held, that the property and possession of the goods had vested absolutely in A., the vendee, before they were re-delivered to B. & Co. at Manchester; and that, by such re-delivery, the latter acquired no new rights, as unpaid vendors. *Valpy v. Gibson*. 837

2. *Seemle*, that the *transitus* was at an end when the goods reached the hands of L. & Co.; but that, at all events, the right of B. & Co. to intercept the goods was gone, when A. had exercised an act of ownership over them, by re-landing them, and sending them to be re-packed. *Ibid*.

3. A contract of sale may be complete and binding, though silent as to the price, (such silence being equivalent to a stipulation for a *reasonable price*;) and as to the time and mode of payment. *Valpy v. Gibson*.
Page 837

II. Of a Specific Chattel.

1. A. addressed the following proposal to B.—“I do hereby agree to provide a *fourteen-horse engine*, and sixteen-horse boiler, with fittings, and every thing complete, for 260*l.*, and to deliver and erect the same at the mill of B, and to set the same to work.”

To this B. replied—“In consideration of your supplying us with a *certain fourteen-horse engine*, which our foreman has inspected, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you and left with us, we agree to pay for the same 260*l.*—[Two instalments were then provided for, and the letter proceeded]—and will, on being satisfied with the work, as per your agreement, pay you the remainder within two months of its completion.”—

Held, that B. bargained for and bought the specific engine which was afterwards erected: and that, assuming there was a warranty as to its power, and that the warranty was broken, that was no answer to an action for the price, but only ground for a reduction, or the subject of a cross-action. *Parsons v. Saxton*.
899

2. *Held*, also, that the stipulation as to deferring the payment of the last instalment until A.'s work was done to the satisfaction of B, referred to the work in *erecting* the engine, and not to the price of the engine itself.
899

A new trial was directed, on the ground that no question had been left to the jury as to whether that work was such as ought reasonably to have satisfied B. *Ibid*.

SCIRE FACIAS.

See BANKING COMPANY.

SCRUTINY.

See CASE, I.

SECOND APPLICATION.

See PRACTICE, VIII.

SETTING ASIDE PROCEEDINGS.

See PRACTICE, VII.

SHARES.

See AUCTIONEERS.
RAILWAY COMPANY.

SHERIFF.

I. Escape.

1. A., a prisoner in execution in the common jail for the county of Radnor,—but having a permanent lodging in London, where his wife and family resided, and to which it was his intention to return,—petitioned the court of bankruptcy for protection from process, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and a commissioner of that court issued his warrant to bring A. before him for examination. The prisoner was accordingly brought up to London on Saturday, the 24th of January, and carried before the commissioner at about two o'clock on that day, when his petition was dismissed for informality:—*Held*, that A. had a sufficient residence within the London district to entitle him to present his petition there, and that the commissioner had such jurisdiction in the matter, as to justify the sheriff in yielding obedience to his warrant. *Nias v. Davis*.
Page 444

2. Before five o'clock on the Saturday afternoon, a writ of *habeas corpus* was lodged with the town agent of the sheriff, and a copy served upon the officer who had A. in custody. The writ was sent into Radnorshire that evening, and returned on the following Monday, when A. was taken before a judge at chambers, and committed to the Queen's prison. It appeared that A.'s state of health was such that he could not, without inconvenience and risk, have been carried back to Radnorshire on the Saturday night; and that, in the interval between the dismissal of his petition and his being taken before the judge, the officer who had him in charge allowed him to go to taverns and other places, in London and Middlesex, but always in actual custody:—*Held*, that the sheriff was not guilty of an escape; for, that he was only bound to take his prisoner back to jail within a *convenient* time, and to guard him with a reasonable degree of strictness during the time he was necessarily out of the limits of his county.
444

II. Disputed Possession.

The sheriff having seized goods under process out of this court, an officer of the palace court, during the temporary absence of the sheriff's officer, (whose son remained on the premises with the warrant,) took the goods under process of that court. This court refused to interfere, either by granting an attachment against the officer of the palace court, or by ordering him to refund a sum paid to him in order to obtain the

release of the goods *White v. Chap-
ple.* Page 628

III. *Interpleader Rules*—*See INTERPLEADER.*

SHIP AND SHIPPING.

I. *Authority of Master.*

Where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested: and a person employed by him to superintend the sale, may lawfully pay over the proceeds to him, or to his order. *Ireland v. Thomson.* 149

II. *Total Loss*—*See INSURANCE.*

SIGNATURE.

See CONTRACT.

SMITH.

Obligation of, to shoe a horse, 555 (a).

STAMPS.

Sub-Distributor of—*See CONTRACT, III.*

STATUTE OF LIMITATIONS.

See BOND.

STAY OF PROCEEDINGS.

See PRACTICE, VII.

STOCK-JOBBER.

See PLEADING, II. ii.

STOPPAGE IN TRANSITU.

See SALE, I.

SUB-DISTRIBUTOR OF STAMPS.

See CONTRACT, III.

SUPERVISORSHIP OF EXCISE.

Sale of, void, under 5 & 6 Edw. 6, c. 16. 597, n.

TERMS NOTICE.

See PRACTICE, VI.

TIME BARGAINS.

See PLEADING, II. ii.

TITLE.

Disclaimer of—*See EJECTMENT, I.*

TRANSFER.

Of Shares—*See AUCTIONEER.*

TRANSITUR.

See SALE, I.

TRAVERSABLE ALLEGATION.

See PLEADING, II. iii.

TRESPASS.

I. *Where maintainable.*

A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser, merely because he retains possession of the goods distrained—although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West v. Nibbs.* Page 172

II. *New Trespass.*

In trespass for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him:—*Held*, that the leaving of the stumps and stakes on the land was a new trespass. *Bouryer v. Cook.* 236

TROVER.

See TRESPASS, I.

VIDELICET.

See King v. Norman, p. 884.

VOTE.

See CASE, I.

WASTE LAND.

Presumption of Ownership.

1. The presumption of law, that slips of waste land adjoining a highway belong to the owner of the adjoining enclosed land, may be rebutted by evidence tending to raise a contrary presumption. *Doe d. Harrison v. Hampson.* 267

2. In an action by a rector, to recover a slip of land lying between the glebe and a highway, in order to rebut the presumption of ownership arising from contiguity, it was proved that the defendant and those under whom he claimed had occupied the spot in question for more than forty years, and during four or five successive incumbencies, without interruption; and that there were

alips of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector:—*Held*, that, the whole case on both sides resting on presumption, it was properly left to the jury to say whether or not the evidence given on the defendant's part rebutted the presumption of law on which the plaintiff's case rested.

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REGISTRATION CASES.

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- I. Cases upon the Construction of the REFORM ACT, 2 W. 4, c. 45.

Section 19.—Freehold Tenure.

A. claimed to vote in respect of a burgage tenement in an ancient borough. The case found, that burgage tenements within the borough had always been conveyed by deed of grant, or bargain and sale, without livery of seisin, and without a lease for a year, or any enrolment; that no surrender or admittance was required, nor was any fine paid upon descent or alienation; that the mode of descent was agreeably to the common law, except that females inherited, not as coparceners, but by seniority; that the interest of a *feme covert* was passed without any separate examination of the wife; that the widow of a person dying seised of a burgage tenement had the whole during her chaste viduity; that burgage tenements had always been devisable in the same way as ordinary freeholds; that they were held subject only to the payment of certain fixed annual rents payable to some individual; and that no other services had been performed or payments made in respect of them:—

Held, that, in the absence of evidence on the face of the case to show that the freehold was in any other person, it must be

assumed that A. had such a freehold tenure as to entitle him to be registered, the value being sufficient. *Busher, app., Thompson, resp.* Page 48

Section 26.—Assignee of a Rent-Charge.

The assignee of a rent-charge is not entitled to be registered, unless he has been in the actual receipt of it for six months before the last day of July. *Hayden, app., The Overseers of Twerton, resp.* 1

Section 27.—Sufficiency of Qualification.

Entirety.—A. occupied a shop, which, together with a house and other premises, also occupied by him, constituted a sufficient qualification in point of value, but neither being sufficient alone. The shop was separated from the rest of the premises by a yard, in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him:—*Held*, that the shop could not be joined with the other premises, so as to constitute one entire qualification, under the statute 2 W. 4, c. 45, s. 27. *Powell, app., Price, resp.* 105

Section 32.—Freedom by Right of Birth.

The corporation of M. consists of four classes of burgesses or freemen—1. Capital burgesses (in whom alone was the right of voting prior to the reform act)—2. Assistant burgesses—3. Landholders—4. Free burgesses or commoners. Vacancies in the third class are supplied from the fourth by seniority, and, in the other classes respectively, by election:—*Held*, that one who was a member of the fourth class, by right of

birth, before the 1st of March, 1831, and became a "capital burgess," by election, after that day, is not disqualified as an elector by the 2 W. 4, c. 45, s. 32. *Gale, app., Chubb, resp.* Page 41

Section 33.—Reserved Rights.

A party entitled, before the passing of the 2 W. 4, c. 45, to vote as an inhabitant householder paying scot and lot, does not, by the 33d section of that act, lose his qualification by having omitted for one year to pay his rates before the last day of July. *Nicks, app., Field, resp.* 63

II. Cases decided upon the Construction of the REGISTRATION ACT, 6 & 7 Vict. c. 18.

Section 4.—Notice of Claim.

Service of.—A parish consisted of four divisions, popularly, but improperly, called townships. Four overseers were appointed for the whole parish, one being selected from among the inhabitants of each of the so-called townships. In making out the lists of county voters, the overseer who acted for each division made out a separate list; and each overseer published a separate notice under the 6 & 7 Vict. c. 18, s. 3, sched. (A), No. 2, requiring persons entitled to vote in respect of property situated within *his township* to send in their claims to him. These notices were in each case signed by the particular overseer who acted for that division, and by the assistant overseer, who therein styled themselves "overseers of the township of —." A notice of claim was directed to, and served upon, the overseer of the particular so-called township in which the qualifying property was situate. This notice being objected to, before the barrister at the revision, he corrected the mistake in the lists, and the power conferred upon him by s. 40, and disallowed the objection:—

Held, that the barrister had properly exercised his discretion, and that the notice was, under the circumstances, sufficient, and well served. *Elliot, app., The Overseers of St. Mary Within, Carlisle, resp.* 76

Held, that the barrister had properly exercised his discretion, and that the notice was, under the circumstances, sufficient, and well served. *Elliot, app., The Overseers of St. Mary Within, Carlisle, resp.* 76

Section 17.—Notice of Objection.

1. *Date.*—A notice of objection under the 6 & 7 Vict. c. 18, s. 17, dated of the day and month, without the year, is insufficient. *Beesley, app., Hockin, resp.* 19

2. *Service of.*—The list of voters was signed by three of the overseers and one of the churchwardens, and the service of the notice of objection was upon another churchwarden, who had not signed the list:—*Held*, that the notice was well served. *Ibid.*

A notice of objection, addressed to the voter at A, described as his place of abode in the borough list, was left at his office in B. The office in B. was not the voter's place of abode, and he had no residence in A. The revising barrister decided that the notice had not been given to, or left at the place of abode of, the voter as stated in the list, within the meaning of the 6 & 7 Vict. c. 18, s. 17:—*Held*, that his decision was correct. *Allen, app., Greensill, resp.* Page 100

3. *Description of Objector.*—In a notice of objection under the 6 & 7 Vict. c. 18, s. 17, the objector was described as—"R. F., of &c., on the list of voters for the borough of L." The register of voters for the borough of L. consists of four separate lists, viz. one, of 101 householders for each of three townships comprised in it; and one, of the free-men of the borough. The objector's name was on the last-mentioned list only:—*Held*, that he was insufficiently described in the notice; and that the inaccuracy of description was not cured by the 101st section. *Eidsforth, app., Ferrar, resp.* 9

4. *Place of Abode.*—In a notice of objection, the place of abode of the objector was described as "The Oaks" (without the addition of any parish, township, or other district) "on the register of voters for the parish of St. W." In the list of voters for the parish of St. W., the objector's place of abode was described as "St. W.," and his qualifying property as "The Oaks:—"

Held, that the description was insufficient, and could not be aided by a reference to the list of voters, so as to show that the place called "The Oaks" was in the parish of St. W.; and that the objection was not removed by the finding of the revising barrister that the place referred to was in fact in the parish of St. W. *Woollett, app., Davis, resp.* 115

Section 40.—Amendment at the Revision.

A parish consisted of four divisions, popularly, but improperly, called townships. Four overseers were appointed for the whole parish, one being selected from among the inhabitants of each of the so-called townships. In making out the list of county voters, the overseer who acted for each division made out a separate list; and each overseer published a separate notice under the 6 & 7 Vict. c. 18, s. 3, sched. (A), No. 2, requiring persons entitled to vote in respect of property situate within *his township*, to send in their claims to him. These notices were in each case signed by the particular overseer, who acted for that division, and by the assistant overseer, who therein styled themselves "overseers of the township of —." A notice of claim was directed to, and

served upon, the overseer of the particular so-called township in which the qualifying property was situate. This notice being objected to, before the barrister at the revision, he corrected the mistake in the lists, under the power conferred upon him by s. 40, and disallowed the objection:—*Held*, that the barrister had properly exercised his discretion. *Elliot*, app., *The Overseers of St. Mary Within, Carlisle*, resp. Page 76

Section 42.—Signature by Revising Barrister.

Endorsement.]—An appeal, tendered within the proper time, having been rejected by the officer because the endorsement had not been signed by the revising barrister, as required by the 6 & 7 Vict. c. 18, s. 42.—The court allowed it to be entered *de bene esse* on the fifth day of the term, due diligence appearing to have been used to obtain the signature within the first four days. *Pring*, app., *Estcourt*, resp. 71

The endorsement of an appeal not having been signed by the revising barrister until the fifth day of Michaelmas term, the court refused to allow the appellant to be heard. *Wanklyn*, app., *Woollett*, resp. 86

Sections 44, 45.—Consolidated Appeals.

1. *Who named as Appellant*.]—*Quære*, whether a mere agent, not personally interested in the subject-matter, can be named as appellant to prosecute a consolidated appeal. *Wanklyn*, app., *Woollett*, resp. 86

2. *Absence of Notice*.]—The court has no power to hear an appeal, where the respondent fails to appear, unless the appellant has served upon him a notice,—under the 6 & 7 Vict. c. 18, s. 62,—of his intention to prosecute the appeal, ten days at least before the first day appointed by the court for hearing appeals—that is, ten clear days, exclusive both of the day of service and of the day so appointed. *Norton*, app., *The Town Clerk of Salisbury*, resp. 32

The court will not postpone the hearing of an appeal, in order to afford time to give the necessary notice upon a suggestion that the difficulty has arisen from the circumstance of their having appointed an unusually early day for the hearing of appeals; there having been ample time to give the notice between the day appointed and the day on which the decision of the revising barrister was pronounced. *Adey*, app., *Hill*, resp. 38

The decision of the revising barrister took place on the 16th of October. The appellant's attorney was taken ill in the last week of that month, and died on the 7th of November:—*Held*, that this was no excuse for the absence of the notice to the respondent required by s. 62, and that the court had no power, under s. 64, to aid the appellant, by postpon-

ing the hearing. *Pring*, app., *Estcourt*, resp. Page 73

3. *Dispensation*.]—An application by the respondent for leave to deliver paper-books after the proper time, does not dispense with the notice required to be served upon him by the 6 & 7 Vict. c. 18, s. 62. *Grover*, app., *Bontems*, resp. 70

4. *Signature by Appellant*.]—The notice of the appellant's intention to prosecute his appeal, under the 6 & 7 Vict. c. 62, must be signed by the appellant himself; the signature of an agent will not suffice. *Petherbridge*, app., *Ash*, resp. 74

Where an appeal was tendered within the first four days of the term, with a notice imperfectly signed—The court refused to allow the appeal to be entered (the defect being cured) on the fifth day. *Ibid*.

Section 101.—Inaccurate Description.

See *Eidsforth*, app., *Farrer*, resp. 9.

III. Practice and Course of Proceeding upon Registration Appeals.

1. *Entry of Appeal*.]—An appeal tendered within the proper time, having been rejected by the officer because the endorsement had not been signed by the revising barrister, as required by the 6 & 7 Vict. c. 18, s. 42.—The court allowed it to be entered *de bene esse* on the fifth day of the term, due diligence appearing to have been used to obtain the signature within the first four days. *Pring*, app., *Estcourt*, resp. 71

2. *Endorsement*.]—See *Pring*, app., *Estcourt*, resp. 71; and *Wanklyn*, app., *Woollett*, resp. 86

3. *Delivery of Paper-books*.]—An application by the respondent for leave to deliver paper-books after the proper time, does not dispense with the notice required to be served upon him by the 6 & 7 Vict. c. 18, s. 62. *Grover*, app., *Bontems*, resp. 70

4. *Hearing Appeals*.]—The court has no power to hear an appeal, where the respondent fails to appear, unless the appellant has served upon him a notice,—under 6 & 7 Vict. c. 18, s. 62,—of his intention to prosecute the appeal, ten days at least before the first day appointed by the court for hearing appeals—that is, ten clear days, exclusive both of the day of service and of the day so appointed. *Norton*, app., *The Town Clerk of Salisbury*, resp. 32. And see *Pring*, app., *Estcourt*, resp. 73

5. *Postponing the Hearing*.]—The court will not postpone the hearing of an appeal, in order to afford time to give the necessary notice, under the 6 & 7 Vict. c. 18, s. 62, upon a suggestion that the difficulty has

arisen from the circumstance of their having appointed an unusually early day for the hearing of appeals, there having been ample time to give the notice between the day appointed and the day on which the decision of the revising barrister was pronounced. *Ady, app., Hill, resp.* 38

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